Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DON SUNDQUIST, Governor of Tennessee, *et al.*,

Petitioners,

v.

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a challenge to legislative districting under § 2 of the Voting Rights Act, whether plaintiffs have the legal right to subdivide a region with significant minority population in order to narrow the analysis to smaller areas lacking proportional numbers of majority-minority districts, to exclude any broader regional or statewide focus, and thus effectively to require maximization of such districts under § 2.

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Don Sundquist, Governor of the State of Tennessee, John Wilder, Lt. Governor of the State of Tennessee, James Naifeh, Speaker of the Tennessee House of Representatives, Brook K. Thompson, State Election Coordinator, Lenita McCraw, Election Administrator of Fayette County, Tennessee, Judy Bishop, Election Administrator of Haywood County, Tennessee, Ella Mae Esque, Election Administrator of Lauderdale County, Tennessee, Spence Dupree, Election Administrator of Madison County, Tennessee, Bobbie White, Election Administrator of Shelby County Tennessee, Linda Burnett, Election Administrator of Tipton County, Tennessee, as petitioners and Rural West Tennessee African-American Affairs Council, Inc., Minnie Bommer, C.T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, William Smart, Warren Dickerson as respondents in *Sundquist, et al. v. Rural West Tennessee African-American Affairs Council, Inc.* and Don Sundquist, Governor of the State of Tennessee, Riley Darnell, Secretary of State of the State of Tennessee, Paul G. Summers, Attorney General & Reporter of the State of Tennessee, Brook K. Thompson, State Election Coordinator, Thomas David Hill, II, member of the State Board of Elections, Charlie R. Ashford, member of the State Board of Elections, Michael L. Duncan, member of the State Board of Elections, Lytle Landers, member of the State Board of Elections, Thomas C. Wheeler, member of the State Board of Elections, James Naifeh, Speaker of the Tennessee House of Representatives, John Wilder, Lt. Governor of the State of Tennessee,

PARTIES TO THE PROCEEDING – Continued

as petitioners and Phillip R. Langsdon, Kenneth L. Lewis, Michael McCroskey, E.E. Redditt, and David Shirley as respondents in *Darnell, et al. v. Langsdon, et al.*

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PETITION FOR WRIT OF CERTIORARI

Petitioners, officials of the State of Tennessee, request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-27a) is reported at 209 F.3d 835. The district court's decision on summary judgment motions (Pet. App. 28a-49a) is unreported. The district court's decision after trial (Pet. App. 50a-86a) is reported at 29 F. Supp. 2d 448.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2000. Pet. App. 1a. A timely petition for rehearing was denied on May 16, 2000. Pet. App. 87a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, provides in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any

citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

INTRODUCTION

In Plan A of Chapter 536 of the Tennessee Public Acts of 1994, Tennessee established the legislative districts for its House of Representatives. Plan A creates a proportional 9 majority-black house districts in the seven counties of Southwest Tennessee: Shelby (Memphis), Madison (Jackson), Hardeman, Fayette, Tipton, Lauderdale and Haywood. The Sixth Circuit in this case held that Plan A nevertheless violates § 2 of the Voting Rights Act for failure to create an additional or 10th majority-black

house district in the more rural portion of that seven county area. To support that holding, the court had to give § 2 plaintiffs broad legal license freely to divide up regions of a state containing significant concentrations of minority population into smaller subregions in order to create as many majority-black districts as possible.

This ruling on an important aspect of § 2 redistricting analysis warrants review. It is a recipe for maximization of majority-black districts contrary to this Court's admonition in *Johnson v. De Grandy*, 512 U.S. 997, 1025 (1994): "Failure to maximize cannot be the measure of § 2." The ruling produces that result, moreover, by resolving a critical issue that this Court in *De Grandy* noted but did not have to decide: what "frame of reference" or "geographical scope" to use in examining proportionality (whether majority-black or influence districts). 512 U.S. at 1022 ("no occasion to decide" because parties "agreed in the District Court"). In this case, the parties do not agree on the issue, and the district court recognized that the issue was "outcome determinative" (Pet. App. 36a). The Sixth Circuit's approval, as a matter of law, of the plaintiffs' last minute selection of only the rural part of Southwest Tennessee – revising their earlier position and excluding statewide and Southwest-wide numbers – provides this Court the opportunity to resolve this significant issue.

STATEMENT OF THE CASE

Respondents – *Rural West Tennessee* plaintiffs – brought this case in 1992 to challenge both the 1992

Tennessee House redistricting plan and the 1992 Tennessee Senate redistricting plan under § 2 of the Voting Rights Act and the federal Constitution – the latter vesting jurisdiction in a three-judge district court (28 U.S.C. § 2284(a)). Respondents' § 2 claim alleged vote dilution in all of Southwest Tennessee including Shelby County. The switch to a rural-only position by respondents did not occur until five years later.

The Senate part of this case was resolved first, because the 1992 House Plan was elsewhere held violative of the "one person, one vote" guarantee of the Equal Protection Clause and thus had to be legislatively revised. *Langsdon v. Millsaps*, 436 F. Supp. 447 (W.D. Tenn. 1993), *aff'd*, 510 U.S. 160 (1994). In *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 453 (W.D. Tenn. 1993) (*Rural West Tennessee I*), the three-judge court held that the 1992 Senate plan violated § 2 of the Voting Rights Act. This Court, however, vacated the decision for further consideration in light of *Johnson v. De Grandy*, 512 U.S. 997 (1994).

Upon remand, the three-judge court reversed itself. It re-adopted its prior findings as to both the preconditions in *Thornburgh v. Gingles*, 478 U.S. 30 (1986) and Senate factors from *Rural West Tennessee I*, findings based on voting patterns of black and white voters as to all of Southwest Tennessee including Shelby County. *Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 877 F. Supp. 1096, 1099-1100 (W.D. Tenn. 1995) (*Rural West Tennessee II*). Based on those findings of fact the three-judge court now upheld the validity of the Senate plan in light of *De Grandy*:

> [W]e find that following the clarification to § 2 presented in *De Grandy*, we erred in our first opinion in this case. We now recognize that § 2 does not necessarily require proportionality even when the *Gingles* preconditions have been met and when the plaintiffs have demonstrated the presence of racial polarization and a history of racial inequality. Nonetheless, were we still prevented from recognizing the existence of influence districts, we would reinstate our previous holding. But, an inquiry into 'the totality of the circumstances' should be broad and exhaustive, and, therefore, does allow for consideration of influence districts. When we now include the three influence districts in the 1992 Plan in our evaluation of the 'totality of the circumstances,' we find that the 1992 Plan does not violate § 2 of the Voting Rights Act.

Rural West Tennessee II, 877 F. Supp. at 1111. This Court summarily affirmed that decision. *Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 516 U.S. 801 (1995).[1]

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[1] The three-judge court in *Rural West Tennessee II* factored "influence districts", *i.e.*, districts with a minority voting age population of between 25% and 55%, into the "totality of the circumstances" analysis. Specifically, the court noted that "a minority population that votes as a bloc . . . and comprises at least 25% of the voting-age population in an electoral district will have a significant influence on candidates in virtually every election." *Rural West Tennessee II*, 877 F. Supp. at 1105. The court concluded: "Based on the statistical results of the 1992 and 1994 elections, as well as the testimony of two members of the Senate, when a minority group comprises 25% or more of the voting-age population, members of the group will have sufficient political influence to deem that district an influence district. A serious political candidate cannot ignore such a sizable portion of the electorate." *Id.*

While the Senate case was initially in this Court in 1993, the Tennessee General Assembly enacted the 1994 Plan A to replace the invalidated 1992 House plan, and respondents applied their statutory and constitutional claims to Plan A. They again included Shelby county in their § 2 challenge. The three-judge court held the Plan A challenge in abeyance until 1995, when this Court affirmed *Rural West Tennessee II*'s rejection of the § 2 challenge to the Senate plan. At that point, respondents amended their complaint once more dropping their constitutional claims, so that the three-judge court was disbanded and the case reassigned to a single district court judge. The Second Amended Complaint continued to include Shelby County, as well as a statewide challenge, in the § 2 claim.

In 1997, the new single-judge district court "inquired" of the respondents whether they wanted to continue to include Shelby County in their challenge. (Joint Appendix before the Sixth Circuit, p. 297). On cross-motions for summary judgment, respondents, seeing the handwriting on the wall, changed their position by excluding Shelby County from their challenge. The district court adopted the new position without trial of any possibly relevant facts (*e.g.*, about geographical communities of interest, media markets, *etc.*). Pet. App. 36a-46a. The Court stated that this choice of "frame of reference" was "outcome determinative"; "if the court considers statewide statistics or includes Shelby County in its proportionality analysis for rural west Tennessee,

the plaintiffs will not prevail on their vote dilution claim." Pet. App. 36a, 38a.[2]

The district court then conducted a trial. It relied upon the prior findings of fact as to both the *Gingles* preconditions (voting patterns) and Senate factors in *Rural West Tennessee I*, findings that included Shelby County. But having already excluded Shelby County and the entire state from the proportionality analysis, the district court held the 1994 Plan A violated § 2. Pursuant to the 1994 legislation itself, the district court then ordered implementation of the 1994 Plan B, which added a majority-black district in three of the rural counties in Southwest Tennessee (leaving the other three still without such a district).[3] Pet. App. 89a.

The Sixth Circuit affirmed, adopting the district court's grant of legal leeway to § 2 plaintiffs to define the "disputed area" for results analysis. Justice Stevens

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[2] For example, if Shelby County is included in the "disputed area," the ratio of black voting age population (VAP) to total voting age population is 37.9%. Under Plan A, there are 9 majority-black house districts of the 21.3 total house districts in Southwest Tennessee, meaning that the ratio of majority-black house districts to total house districts in Southwest Tennessee is 42.25%. An additional majority-black house district increases the ratio of majority-black districts to total house districts to 46.9%. On the other hand, the ratio of black VAP to total VAP in Southwest Tennessee without Shelby County is 31.01%. There are no majority-black districts in Southwest Tennessee without Shelby County. Statewide figures are given *infra* at page 10.

[3] Maps of Plan A and Plan B are included in the appendix at Pet. App. 88a-89a.

denied a stay, so Plan B is now in effect for the 2000 elections. Petitioners seek review.

REASONS FOR GRANTING THE PETITION

I. The Decision Below, Resolving A Question Left Open By This Court, Erroneously Establishes A Principle Of Law That Plaintiffs In § 2 Cases May Maximize The Majority-Minority Districts In A State By Narrowly Carving The Area Of Dispute For Proportionality Purposes.

The Sixth Circuit recognized that this Court in *De Grandy* "explicitly left open the question of the proper frame of reference for analyzing § 2 claims" where the parties are not in agreement on the "disputed area." Pet. App. 17a. In answering the question, however, the Sixth Circuit established a legal principle that is fundamentally inconsistent with this Court's rejection of maximization in *De Grandy*.

The Sixth Circuit held that the "disputed area" is the area chosen by the plaintiffs – even after five years of a contrary position, and without a trial on any facts that might bear on the issue, including whether selection of a *single* frame of reference is required. This newly declared legal right essentially gives plaintiffs free rein to define a single most advantageous "disputed area" that effectively determines the end-results analysis that is critical under *De Grandy*. Quite simply, there is no practical limitation on such "area" definition short of maximization. Up to maximization, under the Sixth Circuit's ruling, it should always be possible for plaintiffs to narrow and craft a

"disputed area" to squeeze out an extra majority-minority district. Yet *De Grandy* makes clear that maximization is not the rule of § 2 even with the other *Gingles* preconditions met. The Sixth Circuit's principle, in short, is tantamount to a prescription for maximization, contrary to *De Grandy*.

The facts of this case illustrate the maximization consequences of the Sixth Circuit's principle even though relief stopped short in this case. In three of the six "rural Southwest Tennessee" counties – Lauderdale, Tipton and Fayette – voters remain outside any majority-black district under the now-in-force Plan B. Under the Sixth Circuit's principle, these voters could bring a new lawsuit seeking to create an additional majority-black district in that three-county subregion, and in such a suit, the new Plan B majority-black district in neighboring Madison, Hardeman and Haywood counties would be immaterial – just as the court held Shelby County's majority-black districts were immaterial to analysis of the contiguous six counties here. There is no evident stopping point, short of maximization of compact majority-black districts, to the Sixth Circuit's license to plaintiffs to define the frame of reference as a matter of law.

The Sixth Circuit's ruling conflicts not only with *De Grandy's* repudiation of a maximization rule for § 2 but also with the more general recognition that influence districts must play a prominent role under § 2. Indeed, it was for that reason that the three-judge district court (affirmed by this Court) upheld the Senate plan, after a contrary ruling was vacated for reconsideration in light of *De Grandy*. *See* pages 4-5, *supra*. House Plan A compares favorably with the Senate Plan, yet the Sixth Circuit

held it unlawful, based on the new narrow focus on only six of the originally targeted counties:

Plan/Population	Statewide	Southwest Tennessee
Black Voting Age	14%	37%
1992 Senate Plan		
Majority-Black Districts	3/33 (9.09%)	2/7 (28.57%)
Influence Districts	3/33 (9.09%)	2/7 (28.57%)
Total	6/33 (18.18%)	4/7 (57.14%)
1994 House Plan (A)		
Majority-Black Districts	12/99 (12.12%)	9/21.3 (42.53%)
Influence Districts	10/99 (10.10%)	7/21.3 (32.86%)
Total	22/99 (22.22%)	16/21.3 (75.11%)
1994 House Plan (B)		
Majority-Black Districts	13/99 (13.13%)	10/21.3 (46.94%)
Influence Districts	9/99 (9.09%)	6/21.3% (28.16%)
Total	22/99 (22.22%)	16/21.3 (75.11%)

Rural West Tennessee II, 877 F. Supp. at 1107-10.[4]

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[4] There are 33 Senate districts statewide and 7 Senate districts in Southwest Tennessee. There are 99 House districts statewide and 21.3 House districts in Southwest Tennessee.

The Sixth Circuit gave no sound justification for its ruling. It stated that the "*Gingles* preconditions operate to prevent just the sort of limitlessly small 'reverse gerrymander' whose specter the State raises here." Pet. App. 19a. But, unless the court meant "limitlessly small" to refer to something even beyond maximization, this is simply no response. The only relevant precondition in *Gingles* requires that the minority population be of sufficient number and compactness that an effective majority-minority district can be drawn. That precondition limits only the maximum number of effective minority-majority districts that can be drawn in a certain region with significant minority population. It does nothing to limit the ability of plaintiffs to achieve that maximum by carving up a region where there is a substantial minority population into subregions so as to create as many compact majority-minority districts as possible.

The Sixth Circuit also relied on *Shaw v. Hunt*, 517 U.S. 899, 917 (1996), to reject consideration of either statewide or regional numbers in the end-results analysis required by § 2. Pet. App. 17a-18a. That reliance misconstrues *Shaw*, which held that a racial gerrymander could not be defended against constitutional attack on the ground that creating a majority-black district in a far-flung noncontiguous part of the state was necessary relief for a (never adjudicated) violation of § 2 of the Voting Rights Act elsewhere. This case, in contrast, involves a different legal issue (the threshold question of how to determine a § 2 violation in the first place) and critically different facts (immediately neighboring counties, not distant and

unconnected regions on the other side of a State). Nothing in *Shaw* supports the legal license to § 2 plaintiffs the Sixth Circuit established here.

II. The Legal Question Presented Is Of Importance To Tennessee And Other States As They Prepare For The Upcoming Redistricting After The 2000 Decennial Census.

Although this case involves redistricting of the Tennessee House of Representatives for the 1990s, the question presented is of broad importance. Its answer determines how any court hearing a § 2 challenge to legislative districting conducts the end-results, or proportionality analysis that is critical under *De Grandy* – and thus how legislatures go about redistricting in the first instance. In the 1990s, at least 16 states[5] including Tennessee faced lawsuits challenging the validity of their state

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[5] In addition to Tennessee, those states are: Arkansas – *Jeffers v. Tucker*, 847 F. Supp. 655 (E.D. Ark. 1994); Colorado – *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996); Florida – *Johnson v. De Grandy*, 512 U.S. 997, 1025 (1994); Illinois – *Legislative Redistricting Commission v. LaPaille*, 792 F. Supp. 1110 (N.D. Ill. 1992), *aff'd sub nom. Gardner v. Illinois Redistricting Commission*, 506 U.S. 948 (1992); Indiana – *Dickinson v. Indiana State Election Board*, 933 F.2d 497 (7th Cir. 1991); Maryland – *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994); Michigan – *NAACP v. Austin*, 857 F. Supp. 560 (E.D. Mich. 1994); Minnesota – *Growe v. Emison*, 507 U.S. 25 (1993); Montana – *Old Person v. Cooney*, No. CV-96-004-GP-PGH (D. Mont. 1996); New York – *Fund for Accurate and Informed Representation, Inc.*, 796 F.Supp. 662 (N.D.N.Y. 1992); Ohio – *Voinovich v. Quilter*, 507 U.S. 146 (1993); Pennsylvania – *Harrison v. Pennsylvania Legislative Reapportionment Commission*, 1992 WL 95909 (E.D. Pa. 1992); South Carolina – *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996); Texas – *Terrazas v. Slagle*, 821

legislative redistricting plans under § 2 of the Voting Rights Act. There is no reason to believe that such litigation will abate in the upcoming round of decennial redistricting. How the States frame and defend their post-2000 redistricting plans turns on the resolution of the question presented here.

Tennessee, in particular, has a strong interest in review and reversal of the Sixth Circuit decision, even though Plan B will not, in the ordinary course, be used after the 2000 election. Although Tennessee legislative redistricting is not subject to § 5 non-retrogression duty (*compare Reno v. Bossier Parish School Board*, 120 S.Ct. 866, 871 (2000)), Tennessee will begin its redistricting process with whatever legally valid plan is then in place: it does not "wipe the slate clean." *Kelly v. Bennett*, 95 F. Supp. 2d 1301, 1306-07 (M.D. Ala. 2000) (rejecting mootness). It is accordingly important to Tennessee that the Sixth Circuit decision invalidating Plan A, based on a grant to respondents of a license to redefine the area of end-results analysis, be reversed. In the ordinary course of legislative redistricting, such a reversal would affect whether in the upcoming post-2000 redistricting, an additional majority-black district in rural Southwest Tennessee is presumptively necessary in order to comply with § 2 of the Voting Rights Act.

F. Supp. 1162 (W.D. Tex. 1993); Wisconsin – *Milwaukee Branch of the N.A.A.C.P.*, 935 F. Supp. 1419 (E.D.Wisc. 1996).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RURAL WEST TENNESSEE AFRICAN AMERICAN-AFFAIRS COUNCIL, et al. (98-6718), PHILLIP R. LANSDON, et al. (98-6778),	Nos. 98-6718/6778
Plaintiffs-Appellees,	
v.	
DON SUNDQUIST Governor of the State of Tennessee, et al.,	
Defendants-Appellants.	

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
Nos. 92-02407; 92-02415 – Jerome Turner, District Judge.

Argued: March 16, 2000

Decided and Filed: April 3, 2000*

Before: JONES, BATCHELDER, and CLAY, Circuit Judges.

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*This decision was originally issued on April 3, 2000. It is now being issued to incorporate Judge Jones' separate concurring opinion.

COUNSEL

ARGUED: Michael W. Catalano, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellants. Laughlin McDonald, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Atlanta, Georgia, John L. Ryder, APPERSON, CRUMP & MAXWELL, Memphis, Tennessee, for Appellees. **ON BRIEF:** Michael W. Catalano, Paul G. Summers, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellants. Laughlin McDonald, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Atlanta, Georgia, John L. Ryder, APPERSON, CRUMP & MAXWELL, Memphis, Tennessee, John R. Walker, BAKER, DONELSON, BEARMAN & CALDWELL, Memphis, Tennessee, Richard H. Dinkins, DODSON, PARKER, DINKINS & BEHM, Nashville, Tennessee, for Appellees.

BATCHELDER J., delivered the opinion of the court, in which CLAY, J., joined. JONES, J. (pp. 18-23), issued a separate concurring opinion.

OPINION

BATCHELDER, Circuit Judge. Don Sundquist, Governor of the State of Tennessee, and other state officials appeal from a district court order finding that a districting plan for the Tennessee House of Representatives unlawfully dilutes African-American voting strength in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and enjoining further use of that plan. The State further requests a stay of the district court's order for elections

scheduled to begin in August of 2000. For the reasons set forth below, we affirm the order of the district court, and deny the motion for a stay as moot.

I

In April of 1992, the Tennessee General Assembly enacted legislation reapportioning the State's single-member House of Representatives and Senate districts. Tenn. Code Ann. §§ 3-1-102 & 103 (1992) (repealed 1994). Prior to the 1992 primaries, the Rural West Tennessee African-American Affairs Council ("RWTAAC") and certain registered voters in Tennessee filed suit charging that both the Senate Plan and the House Plan violated § 2 of the Voting Rights Act and the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Phillip R. Langsdon and other registered voters in Tennessee filed suit challenging the validity of the House Plan on the grounds that it violated § 2 of Voting Rights Act and the "one person, one vote" doctrine of the Fourteenth Amendment; the plaintiffs also challenged the House Plan on other grounds subsequently dismissed.

A three-judge panel of the district court convened and ordered the two cases consolidated. On September 15, 1993, the panel held that the House Plan was unconstitutional because it violated the one person, one vote doctrine of the Equal Protection Clause. *RWTAAC v. McWherter*, 836 F. Supp. 447, 452 (W.D. Tenn. 1993). The court ordered the defendants to prepare and submit a constitutional apportionment plan by January 25, 1994. *Id.* The State appealed to the United States Supreme Court.

On November 4, 1993, the district court ruled that the Senate Plan violated § 2 of the Voting Rights Act by affording African-American voters in west Tennessee less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *RWTAAC v. McWherter*, 836 F. Supp. 453, 466 (W.D. Tenn. 1993) ("*RWTAAC I*"). The State appealed, and the Supreme Court vacated the panel's order and remanded for further consideration in light of *Johnson v. DeGrandy*, 512 U.S. 997 (1994). *RWTAAC v. McWherter*, 512 U.S. 1249 (1994). On remand, the district court reversed its decision in *RWTAAC I* and held that the Senate Plan conformed to the Voting Rights Act. *RWTAAC v. McWherter*, 877 F. Supp. 1096, 1098 (W.D. Tenn. 1995) ("*RWTAAC II*"). The plaintiffs appealed.

While the appeals in the Senate and House Plan cases were pending, the Tennessee General Assembly adopted a new House Plan and submitted it to the district court. Tenn. Code Ann. § 3-1-103 (1994). The court found that the new Plan complied with the Equal Protection Clause's one person, one vote requirement. It delayed consideration of the other challenges to the House Plan until the Supreme Court ruled on the appeals pending in the Senate case.

The Supreme Court affirmed the dismissal of the plaintiffs' claims as to the Senate Plan on October 4, 1995. *RWTAAC v. Sundquist*, 516 U.S. 801 (1995). RWTAAC then amended its complaint to challenge the House Plan on the sole ground that it violated § 2 of the Voting Rights Act. Because the amended complaint contained no constitutional claims, the three-judge court disbanded itself. After a trial on the merits of the plaintiffs' consolidated

claim of vote dilution, the Honorable Jerome Turner, on November 6, 1998, declared the 1994 House Plan to be violative of the Voting Rights Act and enjoined the defendants from using it in future elections. *RWTAAC v. Sundquist*, 29 F. Supp. 2d 448, 450 (W.D. Tenn. 1998). The state defendants bring this timely appeal.

II

"A district court's factual findings regarding Section 2 violations and the determination of whether vote dilution has occurred are ordinarily reviewed for clear error." *Cousin v. McWherter*, 46 F.3d 568, 574 (6th Cir. 1995) (citing Fed. R. Civ. P. 52(a) and *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). However, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gingles*, 478 U.S. at 79 (internal quotation marks omitted).

A

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

Before considering whether the House Plan dilutes minority voting strength in rural west Tennessee and thus denies members of the minority group a fair opportunity to elect representatives of their choice, we must determine whether the plaintiffs have met the three preconditions announced by the Supreme Court in *Thornburg v. Gingles,* 478 U.S. at 50-51. The plaintiffs must demonstrate that 1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) the minority group is politically cohesive; and 3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Id.* The parties agree that the first two *Gingles* preconditions have been satisfied. They clash on the question whether whites vote as a bloc usually to defeat

the candidates of choice of African-American voters, contesting most hotly the weight to be given to particular sets of election data.

B

Chapter 536 of the Public Acts of 1994 provides a three-part reapportionment plan for Tennessee's ninety-nine house districts. Plan A, at issue in this case, creates twelve majority-African-American districts. None of these districts, however, lies in the area that plaintiffs describe as rural west Tennessee, which includes Madison, Haywood, Hardeman, Tipton, Fayette, and Lauderdale counties. Chapter 536 provides that should a court find that Plan A unlawfully dilutes minority voting strength, Plan B, which creates thirteen majority-African-American house districts, including one in rural west Tennessee, will take effect. Plan C, which would have reinstated the 1992 house redistricting plan had the State prevailed on its claim that the 1992 plan complied with the Equal Protection Clause, is moot. *See Millsaps v. Langsdon*, 510 U.S. 1160 (1994) (affirming the district court's ruling that the 1992 house redistricting plan violated the "one person, one vote" doctrine).

At trial, both parties presented expert testimony regarding voter behavior in rural west Tennessee. Plaintiffs' expert, Dr. Steven Cole, analyzed eleven legislative elections which had both black and white candidates from 1974 to 1996 using bivariate ecological regression analysis, and found that the black preferred candidates lost nine times (82%). Average black cohesion was 67%, and average white cohesion was 89%. An analysis of

homogenous white precincts for legislative contests from 1994 to 1996 showed that on average 80% of whites voted for the white candidates over the black candidates. There were no homogenous black precincts. Based on this evidence, Dr. Cole concluded that white voters tend to vote as a bloc so as usually to defeat the candidate of choice of African-American voters.

The State's experts, Dr. William Lyons and Dr. Michael Gant, analyzed ten black-white legislative contests in rural west Tennessee from 1986 to 1996, and found that the minority-preferred candidates had been defeated nine times (90%). Average black cohesion was 64%, and average white cohesion was 86%. Because black voter turnout was roughly equal to white voter turnout in black-white elections and in elections that had only white candidates, Drs. Lyons and Gant also analyzed eleven white-white legislative contests from 1986 to 1996. Adding the results to those from the black-white contests, Drs. Lyons and Gant found that the preferred candidate of black voters was defeated eleven out of twenty-one times (52.38%).

While Drs. Lyons and Gant acknowledged that the minority-preferred candidate usually lost, and hence that the results of state legislative contests in rural west Tennessee were indicative of minority vote dilution, they noted that a difference in one election would change this outcome. They therefore examined twenty-four black-white and twenty-six white-white countywide elections from 1986 to 1996. In the black-white contests, they found that the black-preferred candidate was defeated thirteen times (54%). For white-white countywide elections, the

black-preferred candidate lost six times (23%). Combining all the countywide contest from 1986 to 1996, the black-preferred candidate lost eighteen out of fifty times (36%). Noting that if all of the countywide elections were combined with all of the legislative elections, the results showed that the black-preferred candidate lost only twenty-nine of seventy-one elections (41%), the defense experts concluded that election results in rural west Tennessee were not, in general, indicative of minority vote dilution.

After hearing this testimony, the district court held that the plaintiffs had made a showing sufficient to satisfy the third *Gingles* precondition. The district court placed primary emphasis on the results of the black-white contests and, due to the significant number of legislative elections analyzed, determined that the results from the countywide contests were not particularly useful or necessary. In light of its limited probativeness, the district court concluded, the white-white and countywide evidence was insufficient to overcome the fact that a white voting bloc defeats the minority-preferred candidate at least 82% of the time in interracial legislative elections in rural west Tennessee.

On appeal, the State argues that the district court erred. The State contends, in essence, that the district court was obliged to give equal and controlling weight to white-white and non-legislative contests in its analysis under the third *Gingles* factor.

C

This court has made clear that white-white elections are relevant in the analysis of a voting dilution claim. In *Cousin v. Sundquist*, we considered a § 2 challenge to the at-large method of electing judges utilized by Hamilton County, Tennessee. *Cousin*, 145 F.3d 818, 820 (6th Cir. 1998). The plaintiffs' expert used average cohesion figures from black-white elections in connection with voter turnout information to determine that, in order to succeed in a Hamilton County election, a hypothetical black candidate would need a number of white crossover votes exceeding the average crossover suggested by the cohesion figures. *Id.* at 824. The defendants' expert, by contrast, used both black-white and white-white election results, identified the minority's preferred candidate in each, and determined that the white majority did not regularly vote in such a way as to deprive black voters in Hamilton County of the opportunity to elect their candidate of choice. *Id.* In preferring the methodology of the defense expert, we noted: "The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority-preferred candidates, whatever their race, usually lose." *Id.* at 825.

While the plain import of *Cousin* is that courts are not foreclosed from considering electoral races involving only white candidates, that case does not suggest (as the State seems to argue) that white-white contests are necessarily entitled to the same weight as those involving a minority candidate. As Judge Richard Arnold has pithily stated, the Voting Rights Act's guarantee of equal opportunity is not met when "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v.*

Clinton, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three judge panel). This court, along with others, has accordingly held that a candidate's race can be relevant to a § 2 inquiry under certain circumstances. *See Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994); *see also, e.g., Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc) (holding that white-white elections may be considered, but are less probative than those involving black candidates). One such circumstance occurs when white bloc voting is "targeted" against black candidates. *Clarke*, 40 F.3d at 812.

In this case, there is marked evidence of targeting; the experts for both the plaintiffs and the defendants agreed that white voter cohesion in rural west Tennessee increases from 59% in white-white elections to 86% in black-white elections. Perhaps not unrelatedly, no African-American candidate has ever won an interracial legislative contest in the six-county area, despite many candidacies. In view of such evidence that a white voting bloc coalesces to frustrate African-American candidacies, the district court properly considered the race of candidates in its § 2 analysis, and accorded greater weight to the results of black-white elections.

Similarly, the district court was correct to discount the results of countywide contests. The parties stipulated that legislative elections were the most legally relevant, and the rulings of our sister circuits support the parties' appraisal. *See, e.g., Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (suggesting that exogenous elections alone cannot prove racially polarized voting, but can be considered as "additional evidence"). At trial, data were presented from twenty-one legislative

elections over a period of ten years – a substantial body of evidence. *See Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1130 (3d Cir. 1993) (holding that seven elections over a period of ten years was a suitable sample such that the court could discern the presence of a pattern of white bloc voting usually defeating the minority voters' candidate of choice). The State nevertheless advocates the inclusion of the countywide elections on the ground that a different outcome in one of the eleven legislative elections in which the preferred candidate of African-Americans was defeated would alter the minority vote dilution determination. But the record contains no information that would allow us to evaluate the claimed marginal character of the statistics derived from the legislative contests. More importantly, the State's claim rests on the assumption that black-white and white-white legislative elections should be given equal weight. As we have pointed out, however, that assumption is not valid in this case.

In sum, we find no clear error in the district court's determination that the plaintiffs have satisfied the third *Gingles* precondition. The data from the legislative elections were sufficiently robust for the district court to discern whether there existed a pattern of white bloc voting. When the black-white legislative elections are afforded greater weight, the data show that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate in rural west Tennessee.

III

Having determined that the plaintiffs have met the three *Gingles* preconditions, we turn to the question whether, given the "totality of the circumstances," the House Plan has in fact "diluted" African-American electoral strength and thus denied African-Americans in rural west Tennessee a fair opportunity to elect representatives of their choice. *See Clarke*, 40 F.3d at 811. The Senate Report which accompanied the 1982 amendments to the Voting Rights Act specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 97-417, at 28-29 (1982). The Report notes also that there may be probative value to evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and

that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous. *Id.* at 45.

The Supreme Court has recently highlighted a new element – proportionality – to be weighed in the totality of the circumstances. In *Johnson v. De Grandy*, a case involving a challenge to Florida's legislative reapportionment plan, the Court concluded that § 2 relief should not be granted because, notwithstanding the presence of continued discrimination and racial bloc voting, minority voters were able to form effective voting majorities in a number of legislative districts that were roughly proportional to their respective shares in the voting age population. *De Grandy*, 512 U.S. 997, 1024 (1994). The Court emphasized, however, that proportionality is not a "safe harbor:" "the degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilute minority voting strength." *Id.* at 1020-21.

A

The district court found that the totality of the circumstances indicated that the House Plan unlawfully dilutes minority voting strength in rural west Tennessee. Beginning with the two factors that the Supreme Court has declared are the most important in balancing the totality of the circumstances, *see Gingles*, 478 U.S. at 48 n. 15, the court found that no African-American had been elected to the state legislature from the six-county area, and that the experts at the trial agreed that voting in the

area is racially polarized. The court next took judicial notice of findings from the Senate Plan cases, *RWTAAC I & II*, regarding the history and effect of discrimination in voting in western Tennessee. The court in the Senate Plan cases had recounted the entire history of official discrimination from the pre-Civil War era, a time-frame whose use we disapproved of in the *Cousin* case, 145 F.3d at 832, but went on to cite two cases from the 1980s which indicate that voting rights violations by public officials in rural west Tennessee are ongoing. *See Taylor v. Haywood County*, 544 F. Supp. 1122, 1131 (W.D. Tenn. 1982) (holding that change to an at-large election scheme was a result of purposeful intention to dilute black voting strength); *Bills v. Alexander*, No. 83-12220 (W.D. Tenn. 1983) (approving settlement setting up a new system to ensure the opportunity of black citizens to participate meaningfully in the political process). The court concluded that as a result of those ongoing violations, African-Americans had suffered disadvantages in such areas as education, employment, and health.

The district court further found that the Tennessee House of Representatives was responsive to the needs of black voters in the rural western part of the state, a factor upon which this court has laid heavy emphasis in the past. *See Cousin*, 145 F.3d at 833. The district court questioned the state policy of maintaining municipal boundaries wherever possible in configuring the legislative districts, since the plan itself fractured certain cities. Under the heading of "miscellaneous" factors, the court concluded that there was no evidence of suspect electoral

practices, racial appeals in political campaigns, or a slating process or other mechanism used to prevent minority candidacies.

Turning to the question of proportionality, the district court noted that blacks make up 31.01% of the voting age population of the six counties comprising rural western Tennessee, but that none of the five house districts covering that area contains a majority of black voters. The court acknowledged that in four of the five districts minority members make up 25-55% of the population and hence could meaningfully affect election outcomes in those four districts, but concluded that in the absence of a single majority black district, this fact had little probative significance. Balancing the lack of proportionality with the other factors from the Senate Report, the court concluded that black voters in rural west Tennessee do not have equal opportunity in the political process.

The State's primary quarrel with this determination concerns the geographical area on which the court focused in conducting the proportionality analysis.[1] The State argues that the court should have considered proportionality in the entire state or, in the alternative, in an area that includes Shelby County along with the six counties of rural west Tennessee. On a statewide basis, there are twelve majority black house districts out of a total of ninety-nine, which, the State contends, is substantially proportional to Tennessee's black voting age population

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[1] The State also challenges the district court's finding regarding the history of official discrimination in voting in western Tennessee. We have carefully considered this question, and find no error in the district court's determination.

of 14.4%. In the seven-county area that includes Shelby County, the black voting age population is 37.9%; since 42.85% of the house districts are majority black in that seven-county area, the State says, blacks are in fact over-represented.

B

In *Johnson v. De Grandy*, the Supreme Court explicitly left open the question of the proper frame of reference for analyzing § 2 claims. *De Grandy*, 512 U.S. at 1022 ("[W]e have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy."). Nevertheless, the reasoning in that case, and in *Shaw v. Hunt*, 517 U.S. 899, 917 (1996), persuades us that neither over-proportionality in one area of the State nor substantial proportionality in the State as a whole should ordinarily be used to offset a problem of vote dilution in one discrete area of the State.

In *De Grandy*, the State of Florida argued that, as a matter of law, no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population. *De Grandy*, 512 U.S. at 1017. Critiquing this "safe harbor" argument, the Supreme Court remarked on the State's "unexplored premise of highly suspect validity:"

> that in any given voting jurisdiction (or portion of that jurisdiction under consideration), the rights of some minority voters under § 2 may be

> traded off against the rights of other members of the same minority class. Under the State's view, the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line.

Id. at 1019. Similarly, in *Shaw*, the Court considered North Carolina's argument that a bizarrely shaped majority-black congressional district was a narrowly tailored remedy for a § 2 violation elsewhere in the State. *Shaw*, 517 U.S. at 916-17. Finding this position "singularly unpersuasive," the Court stated:

> If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State. . . .
>
> . . . To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.

Id. at 917. Taken together, the admonitions of *De Grandy* and *Shaw* dissuade us from accepting the Tennessee's invitation to append Shelby County, or the State as whole, to the geographical frame of reference that the plaintiffs have selected because to do so would require us to trade the § 2 rights of individual African-Americans in

rural west Tennessee against those of African-American groups elsewhere in the State.

The State complains that by allowing the plaintiffs to define the frame of reference for their § 2 claim, we will enable future litigants to carve up successively smaller areas of the State until they are able to maximize the number of majority-minority legislative districts – a result not countenanced by the Voting Rights Act. *See De Grandy*, 512 U.S. at 1017 ("Failure to maximize cannot be the measure of § 2."). As the district court pointed out, however, the *Gingles* preconditions operate to prevent just the sort of limitlessly small "reverse gerrymander" whose specter the State raises here. *See, e.g., Campos v. City of Houston*, 113 F.3d 544, 547-48 (5th Cir. 1997) (holding that minority group was not sufficiently large and geographically compact to sustain a § 2 claim). In this regard, we note that the region selected by the plaintiffs in this case is a sensible one – indeed, more sensible than the seven-county area including Shelby County urged by the State. While Shelby County is the southernmost and westernmost county in the State, and, like the six neighboring counties of rural west Tennessee, has a large African-American population, the seven counties do not form a coherent demographic unit. The African-American population in Shelby County is concentrated in inner-city Memphis, and is largely set off from rural west Tennessee by a "buffer zone" of white suburbs. As a result, the African-American populations in these two areas are not likely to be particularly cohesive. For this reason, the district court properly restricted the geographic scope of relevant statistical data to the six counties of rural west Tennessee.

Having correctly defined its frame of reference, the district court made no clear error in weighing the totality of the circumstances. Rural west Tennessee has an African-American voting age population of 31%, but none of its five house districts is majority-African-American. Legislative elections in the six county area are racially polarized, and no African-American has ever won one. These circumstances simply overwhelm those factors that might favor the State of Tennessee (such as a lack of suspect electoral practices, responsive (albeit mainly white) state legislators, and the possibility that minority voters in minority-African-American districts will be able to influence electoral outcomes). The district court therefore properly held that the plaintiffs had proved a § 2 violation. The remedy that the plaintiffs seek for this violation, creation of one majority-African-American house district in rural west Tennessee through implementation of Plan B of Chapter 536, will take place as a matter of state law.

IV

The late Judge Turner ably considered a complex body of statistical and anecdotal evidence to determine that Plan A of Chapter 536 unlawfully dilutes African-American voting strength in rural west Tennessee. His order enjoining use of the House Plan in future elections is hereby affirmed. The defendants' motion for a stay pending appeal is denied as moot.

CONCURRENCE

NATHANIEL R. JONES, Circuit Judge, concurring. Although I fully concur in the result reached by the majority and in much of its well-reasoned analysis, I write separately to make three points. In concluding that the district court did not err in finding that whites vote as a bloc usually to defeat the preferred candidate of blacks in rural west Tennessee, the majority acknowledges that "the Voting Rights Act's guarantee of equal opportunity is not met when 'candidates favored by blacks can win, but only if the candidates are white.' " *Ante* at 9 (quoting *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three judge panel)). It is on this presupposition that the majority rests its conclusion that, in this case, black-white elections are more probative of vote dilution than white-white elections. I agree with this holding; however, I think it is necessary to explicate further why it matters under the Voting Rights Act ("VRA") when a minority group's only electable candidates of choice are white. I also write separately to note my differences with the district court's definition of "influence" districts, and the majority's conclusion that, in certain unspecified circumstances, compliance with § 2 in one area of a state may offset vote dilution in another area.

I.

I am of the view that it is wise to explain more fully the substantive and jurisprudential support animating our holding that equal opportunity in voting is not

achieved when a minority group may elect representatives of choice when they are white, but are unsuccessful in electing members of their own group. *See id.; see also Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994). Based primarily on this predicate, the majority concludes that the district court did not err in granting more weight to elections involving black and white candidates than those involving only white candidates. *Ante* at 9. The majority is wise to reach these conclusions, because "[w]hen white bloc voting is 'targeted' against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race." *Clarke*, 40 F.3d at 812. Certainly, when white voters have the opportunity to elect preferred candidates of all races, yet black voters may only elect white candidates, black voters patently do not enjoy an opportunity to "elect [their] candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

This conclusion does not blur the reality that § 2 is ultimately concerned with "whether minority-preferred candidates, whatever their race, usually lose" because of white bloc voting. *Cousin v. Sundquist*, 145 F.3d 818, 825 (6th Cir. 1998). It merely recognizes that when a court has found both that a minority group politically coalesces along racial lines, and that whites politically coalesce along racial lines in elections involving a member of that minority group, it defies logic for a court to attempt to assess equal access in a colorblind fashion. In these circumstances, a court is faced with race-conscious political action among both the white majority and the black minority, and the Voting Rights Act clearly protects the

racial minority from the political tyranny of the racial majority. *See* 42 U.S.C. § 1973(b). If a court, however, fails to apply a race-conscious standard that accounts for acute white bloc voting in black-white elections, it may allow less dramatic polarization in white-white elections to obscure the reality of black political exclusion in black-black elections. It is syllogistic that a court cannot discern color-conscious discrimination through colorblind lenses.

The VRA's command that we inquire into a candidate's race when faced with black political cohesion and intense white bloc voting stems from findings pertaining to the empirical realities of race-conscious political action, not racial presumptions that blacks, or whites, will only prefer candidates of their race at the polls. *Cf. Shaw v. Reno*, 509 U.S. 630, 647 (1993) (asserting that intentionally-created majority-minority districts may "reinforce[ ] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls"). In this case, the record shows that 60% of whites vote against the black community's preferred candidate in white-white elections, yet almost 90% of whites vote for the white candidate in black-white elections. The record therefore reveals almost total white bloc voting when a politically cohesive group of blacks attempts to elect a member of their racial group. These facts depict the undisputed racial realities of politics in rural west Tennessee, and we cannot wish away these hard political facts in hopes of achieving a colorblind ideal that, as of yet, does not comport with empirical reality.

Moreover, absent compelling evidence that a white candidate in a white-white election is genuinely the black

community's preferred candidate, courts must assess black-white elections to determine whether a politically cohesive minority group actually has a viable candidate of choice, or merely an opportunity to mitigate the impact of white electoral hegemony. *See Cousin*, 145 F.3d at 825 (providing that white-white elections are relevant when "one of the candidates [is] strongly preferred by black voters" or "[w]here black voters have a genuine candidate of choice") (citation omitted); *cf. Citizens for a Better Gretna v. Gretna*, 834 F.2d 496, 503 (5th Cir. 1987) (concluding that a candidate's race is most relevant when the election "offers voters the choice of supporting a viable minority candidate").

Recognizing the relevance of a candidate's race when the record shows minority political cohesion and especially strong white cohesion in elections involving black candidates does not preempt the possibility that a white candidate may be the black community's genuine and actual candidate of choice. As the Second Circuit rightly concluded, "[n]o legal rule should presuppose the inevitability of electoral apartheid – least of all a rule interpreting a statute designed to implement the Fourteenth and Fifteenth Amendments to the Constitution." *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir. 1995). Indeed, the district court properly evaluated the success of the black community's preferred candidate in white-white elections because of our refusal to conclude that racial representation per se is the lynchpin of a dilution determination. *See Cousin*, 145 F.3d at 825. Not only is such an abstracted presumption abhorrent to the color-blind goals of the Equal Protection Clause, *see, e.g., Miller v. Johnson*, 515 U.S. 900, 911-12 (1995), but it directly

conflicts with § 2's dictate that nothing in the Voting Rights Act shall be construed to require proportional representation. *See* 42 U.S.C. § 1973(b).

By granting greater weight to black-white elections when white bloc voting is targeted against black candidates, we do not disrespect this principle. We merely recognize the established realities of white bloc voting in rural west Tennessee, and conclude uncontroversially that blacks do not enjoy an equal opportunity "to participate in the political process and to elect representatives of their choice" when they can elect only those candidates sanctioned by the white majority.

II.

I also write separately to express disagreement with both the district court's definition of "influence" districts for the purposes of the "totality of the circumstances" analysis, and the majority's implicit recognition that, under certain unspecified circumstances, a state may remedy vote dilution in one area of a state by compliance with § 2 in another.

First, the district court erred in adopting the *RWTAAC II* court's bright-line definition of "influence" districts as any district where a minority group comprises between 25% and 55% of the district. *Rural West Tennessee African American Affairs Council, Inc. v. Sundquist*, 29 F. Supp. 2d 448, 461 (W.D. Tenn. 1998). While one might expect a political group to wield significant influence in a district in which it comprises at least one-quarter of the voting age population, the realities of white bloc voting command that we apply a more flexible standard in

assessing the extent to which purported influence districts provide minorities with an equal opportunity to elect representatives of choice. Notwithstanding a minority population that may even approach upwards of 40% in a district, when, as here, 90% of whites coalesce along racial lines to defeat the black community's preferred candidate of choice, the ability of blacks to "influence" elections in these circumstances is specious. The bright-line 25% rule obscures the realities of white bloc voting, and implies black "influence" that may not in fact exist. Accordingly, I would expressly reject the 25% rule, and adopt a more flexible, case-by-case standard that takes white bloc voting into account.

Second, the majority concludes that "neither over-proportionality in one area of the State nor substantial proportionality in the State as a whole *should ordinarily be used* to offset a problem of vote dilution in one discrete area of the State." *Ante* at 14 (emphasis added). For this conclusion, the majority relies upon the Supreme Court's holdings in *Shaw v. Hunt*, 517 U.S. 899 (1996) and *Johnson v. De Grandy*, 512 U.S. 997 (1994), which collectively provide that a state may not remedy vote dilution in one area of a state by compliance with § 2 in another area. Indeed, as the majority acknowledges, the *De Grandy* court scathingly critiqued the premise that "the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class," 512 U.S. at 1019, and the *Shaw* court plainly ruled that "the vote-dilution injuries suffered by . . . persons [in one area of the State] are not remedied by creating a safe majority-black district somewhere else in the State." 517 U.S. at 917. Inexplicably, the majority reads ambiguity into these

conclusions, and thereby leaves the door open to the notion that a state may dilute the vote of minority voters in ways that would otherwise violate § 2, as long as it grants equal opportunity to some other set of minority voters. This conclusion is contrary to the Supreme Court's interpretation of § 2, which clearly provides that a state *may not* remedy vote dilution in one area by legal compliance in another.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILLIP R. LANGSDON, et al., Plaintiffs, V. RILEY DARNELL, et al., Defendants.	)	NO. 92-2415-TUV
RURAL WEST TENNESSEE AFRICAN AMERICAN AFFAIRS COUNCIL, INC., et al., Plaintiffs, V. DON SUNDQUIST, GOVERNOR OF THE STATE OF TENNESSEE, et al., Defendants.	)	NO. 92-2407-TUV

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Filed Jul. 9, 1998)

Plaintiffs in this consolidated civil rights action assert a claim of vote dilution pursuant to § 2 of the Voting

Rights Act, 42 U.S.C. § 1973.[1] Specifically, the Rural West Tennessee African American Affairs Council and certain registered voters in Tennessee (the "Rural West plaintiffs"), along with Phillip R. Langsdon and other registered voters in Tennessee (the "Langsdon plaintiffs") charge that Tennessee's 1994 reapportionment of its ninety-nine state House districts unlawfully dilutes African-American voting strength in rural west Tennessee, a geographic area that includes Madison, Haywood, Hardeman, Tipton, Fayette, and Lauderdale Counties. On May 6, 1996, the Rural West plaintiffs filed a motion for summary judgment on their voting rights claim. In response to this motion, on June 19, 1996, the defendants filed cross-motions for summary judgment against both the Rural West plaintiffs and the Langsdon plaintiffs. Although the Langsdon plaintiffs have not moved for summary judgment on their voting rights claim, they

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[1] A violation of 42 U.S.C. § 1973 is established if:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subdivision (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (b).

have filed memoranda supporting the Rural West plaintiffs' motion and opposing the defendants' motions. For the reasons that follow, the court denies plaintiffs' and defendants' cross-motions for summary judgment.

I. Background

In April of 1992, the Tennessee General Assembly passed Chapter 836 of the Acts of 1992 ("Chapter 836"), which reapportioned the state's single-member House of Representatives and Senate districts. Prior to the 1992 primaries, the Rural West and Langsdon plaintiffs filed lawsuits challenging Chapter 836's House and Senate reapportionment plans on the grounds that they violated the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act. On September 15, 1993, a three-judge panel of this court held that Chapter 836's House districting scheme was unconstitutional because it violated the "one person, one vote doctrine under the Equal Protection Clause." *Rural West Tennessee African-American Affairs Council v. McWherter*, 836 F. Supp. 447, 452 (W.D. Tenn. 1993), *aff'd sub nom., Millsaps v. Langsdon*, 114 S. Ct. 1183 (1994).

In November of 1993, the same three-judge panel ruled that Tennessee's "1992 Senate reapportionment plan violate[d] § 2 of the Voting Rights Act by affording black voters in west Tennessee less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 453, 466 (W. D. Tenn. 1993) ("*Rural West I*"). The Supreme Court vacated

and remanded the court's *Rural West I* decision, 512 U.S. 1248 (1994), for further consideration in light of *Johnson v. De Grandy*, 512 U.S. 997 (1994). On remand this court reversed its decision in *Rural West I* and held that the "1992 [Senate] Plan conform[ed] to the Voting Rights Act." *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1098 (W.D. Tenn. 1995) ("*Rural West II*"), *aff'd sub nom., Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 116 S. Ct. 42 (1995).

While the *Langsdon* and *Rural West I* appeals were pending, the Tennessee General Assembly passed Chapter 536 of the Public Acts of 1994 ("Chapter 536"), which provides a three-part reapportionment plan for Tennessee's House of Representatives, consisting of Plan A and alternative Plans B and C.[2] Plan A creates 12 majority-African-American House districts, but places none in the six county area that plaintiffs describe as rural west Tennessee. Under the terms of Chapter 536, Plan B, which creates 13 majority-African-American House districts, including one in rural west Tennessee, will take effect if this court finds that Plan A unlawfully dilutes minority voting strength.

On January 23, 1995, this court issued an order validating Chapter 536's Plan A after finding that it accorded with the one person, one vote requirement at issue in the prior *Langsdon* decision. This court further

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[2] After the Supreme Court affirmed this court's ruling in *Millsaps v. Langsdon*, 114 S. Ct. 1183 (1994), Plan C, which called for the reinstatement of the districting plan struck down in *Langsdon*, became moot.

ordered that it would delay further consideration of Chapter 536's House plan until the Supreme Court ruled on appeals pending in the Senate case (*Rural West I* and *Rural West II*).

After the Supreme Court affirmed *Rural West II*, on January 25, 1996, the Rural West plaintiffs filed a second amended complaint challenging Plan A on the sole ground that it violates § 2 of the Voting Rights Act by diluting the voting power of blacks in Tennessee, including west Tennessee and rural west Tennessee.[3] Contending that *Rural West I* and *Rural West II* conclusively decided the facts necessary to prove that Plan A dilutes minority voting strength in rural west Tennessee, on May 6, 1996, the Rural West plaintiffs filed a motion for summary judgment on their § 2 dilution claim. In response, defendants filed cross-motions for summary judgment, similarly based on the court's prior findings, and specifically contend that: (1) Shelby County should be considered when the court engages in proportionality[4] analysis and (2) once Shelby County is included in the court's frame of reference, the number of majority-African-American districts is substantially proportional to the black voting age population's share of the total population in the relevant seven-county area.

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[3] Because the second amended complaint contained no constitutional claims, this court disbanded the three-judge court by order entered May 9, 1996.

[4] Under the Voting Rights Act, proportionality is "defined as the relationship between the number of majority-minority voting districts and the minority group's share of the relevant population. . . . " *Johnson v. De Grandy*, 512 U.S. 997, 1025 (1994) (O'Connor, J., concurring).

On March 13, 1997, this court ordered the plaintiffs to advise the court whether their voting rights challenge included Shelby County. The court's March 13th order further provided that if the Rural West plaintiffs were not challenging a seven-county area that included Shelby County, the defendants' motion for summary judgment would be moot and denied accordingly. On March 21, 1997, the Rural west plaintiffs responded to the court's March 13th order by advising that "their Motion for Summary Judgment, as well as their Second Amended Complaint are limited to a claim of vote dilution in the six-county region of Tennessee including, Fayette, Hardeman, Haywood, Lauderdale, Madison, and Tipton Counties." The black voting age population of this six-county area is 31.01%.[5] Of the five House districts that include this six-county area, none is majority-black.[6]

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[5] *See* Pls.' Second Request for Judicial Notice (1990 Census Data), No. 92-2407, Docket Entry No. 29, at p. 2 (June 24, 1992) (hereinafter "Pls.' Second Request for Judicial Notice").

[6] Under Plan A, five majority-white House districts include the six counties of rural west Tennessee in the following manner: House District 72 contains a substantial part of Madison County; House District 73 is located entirely within Madison County; House District 80 includes portions of Fayette and Hardeman Counties; House District 81 includes part of Fayette County and all of Tipton County; and House District 82 includes part of Hardeman County and all of Haywood and Lauderdale Counties. *See* Notice of Filing Chapter 536 of the Public Acts of 1994 and Other Related Documents; District Statistics Report of Chapter 536 of the Public Acts of 1994, No. 92-2407, Docket Entry No. 129 (Jan. 25, 1994) (hereinafter "Notice of Filing Chapter 536").

II. Summary Judgment Standard

The moving party is entitled to summary judgment where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, the court's function is not to weigh the evidence or judge its truth; rather, the court must determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The substantive law governing the case will determine what issues of fact are material. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

A summary judgment movant "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986). Once met, the burden shifts to the non-moving party to set forth specific facts showing a genuine issue of triable fact. Fed. R. Civ. P. 56(e). To meet this burden, the non-movant must present sufficient countervailing evidence such that a jury could return a verdict favorable to the non-moving party. *Anderson*, 477 U.S. at 249-50.

Where the parties have submitted cross-motions for summary judgment, the court addresses "each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991) (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387,

1391 (Fed. Cir. 1987)). Moreover, the fact that both parties have submitted motions for summary judgment does not require the court to find that no issue of material fact exists. *Id.* (citing *Begnaud v. White*, 170 F.2d 323, 327 (6th Cir. 1948)). In short, "summary judgment in favor of either party is not proper if disputes remain as to material facts." *Id.* (citing *Mingus*, 812 F.2d at 1391).

III. Elements of a Claim of Voting Strength Dilution

To meet their burden of production in this alleged § 2 violation, the plaintiffs must satisfy the following three preconditions:

> [1] the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . [2] the minority group must be able to show that it is politically cohesive. . . . [and 3] the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Cousin v. Sundquist, ___ F.3d ___, No. 96-6028, 1998 WL 279113, at *4 (6th Cir. June 1, 1998) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 51-51 (1985)). Once the *Gingles* factors have been established, plaintiffs must still show that under the totality of the circumstances a violation of the Voting Rights Act has occurred. *See De Grandy*, 512 U.S. at 1010 (explaining that following the satisfaction of the *Gingles* factors, the court's inquiry is not complete until the totality of circumstances have been considered).

IV. The Court's Frame of Reference

When the court considers the statistical data necessary for analyzing their voting rights claim, plaintiffs argue that the court should limit its frame of reference to the six-county area of rural west Tennessee. Defendants, however, contend that in addition to using statewide statistics, the court should also employ data from a region that includes not only rural west Tennessee, but also Shelby County. A summary of the results produced by the 1994 House districting scheme provides a preview to the substantial effect that the court's frame of reference could have upon plaintiffs' claim of vote dilution.

A. The Outcome Determinative Nature of the Court's Frame of Reference

Out of the ninety-nine House districts at the statewide level, twelve districts are majority black. Thus, at the statewide level, where black voters comprise 14.4%[7] of the voting-age population, substantial proportionality has been achieved, in that 12.12% of Tennessee's House districts are majority black. When one considers Tennessee's ten influence districts, i.e., a legislative district with a black voting-age population in excess of 25% but less than 55%, 22.2% of Tennessee's House districts are either majority-black or influence districts. *See Rural West II*, 877 F. Supp. at 1104-05 (holding that the presence of influence

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[7] *See Rural West II*, 877 F. Supp. at 1107 (explaining that African-Americans comprise 14.4% of Tennessee's voting age population).

districts should be considered in the totality of the circumstances and adopting a standard rule for labeling an influence district). In *Rural West II*, the court concluded that Tennessee's Senate reapportionment plan, whose three majority-black districts and three influence districts comprised 18.2% of Tennessee's thirty-three Senate districts, did not violate the Voting Rights Act. Relying on the House plan's comparable 22.2% ratio of combined majority-black and influence districts to total House districts at the statewide level, defendants, for obvious reasons, seek to prevail on summary judgment by applying the *Rural West II* holding.

At the regional level, rural west Tennessee, which includes at least part of five House districts and contains a black voting age population of 31.01%, has no majority-black House district, but includes at least part of four influence districts, as such districts are defined by *Rural West II*.[8] However, once Shelby County is included in the regional analysis, the black voting-age population rises to 37.9%,[9] and the number of majority-black districts leaps to nine, making 42.85% of the 21.3 House districts in the seven-county area majority-black. Thus, considering the Supreme Court's decision in *De Grande* and its progeny, a

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[8] House District 73 contains a black voting-age population of 37%; House District 80 contains a black voting-age population of 29%; House District 81 contains a black voting-age population of 29%; and House District 82 contains a black voting age population of 41%. *See* Notice of Filing Chapter 536, *supra* note 6.

[9] *See Rural West II*, 877 F. Supp. at 1110 (stating that the combined black voting age population of rural west Tennessee and Shelby County is 37.9%).

regional analysis that includes Shelby County essentially guarantees a defense victory on summary judgment. *See De Grande*, 512 U.S. at 1014 (emphasizing that substantial proportionality is not dispositive, but holding that where Hispanics constituted 47% of the voting-age population in Dade County, Florida and where 45% of the potential twenty House districts in Dade County were majority-Hispanic, substantial proportionality existed and precluded claim of vote dilution, despite the satisfaction of the *Gingles* factors and a history and legacy of discrimination in the area); *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1353 (8th Cir. 1995) (following *De Grandy* in a challenge to a city's districting scheme for alderman wards and affirming grant of summary judgment where percentage of black voting-age population was 42.7% and percentage of majority-black wards was 42.9%.

In short, if the court considers statewide statistics or includes Shelby County in its proportionality analysis for rural west Tennessee, the plaintiffs will not prevail on their vote dilution claim. If the court, however, limits its analysis exclusively to the six-county region challenged by plaintiffs, the absence of a single majority-black district warrants further inquiry into the equal opportunity of black voters in that area. Having considered the import of the court's frame of reference in the instant matter, the court turns to its rationale for limiting the relevant geographic scope to rural west Tennessee.

B. Limiting the Scope to Rural West Tennessee

Although *De Grandy*, which focused solely on the apportionment of state legislative districts in Dade County, Florida, necessarily implies that plaintiffs may bring a voting rights challenge to a discrete political subdivision within a state, the Supreme Court declined to determine what frame of reference a court should employ when the parties to such a vote dilution lawsuit dispute the court's appropriate geographic scope for relevant statistics. *See De Grande*, 512 U.S. at 1022 ("Thus we have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation. . . ."). As a result, despite *De Grandy's* sole consideration of Dade County statistics, this court in *Rural West II* concluded that "[n]othing in *De Grandy*, however, prohibits a district court from considering statewide statistics, even if the proofs largely concentrate on a particular region of a state." Rural West II, 877 F. Supp. at 1109.[10] However, the court's frame of reference did not affect the outcome in *Rural West II* due to the absence of vote dilution under either a statewide or regional geographic scope. *See id.* at 1110 ("In sum, a consideration of the seven-county region alone does not change the outcome of our decision today."). The *Rural West II* court simply did not confront

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[10] Nevertheless, the *Rural West II* court recognized the importance of regional statistics when it stated "we believe that we should have evaluated more closely regional statistics in our earlier decision in addition to examining statewide evidence." *Rural West II*, 877 F. Supp. at 1109.

the dilemma of potentially different results produced by different frames of reference. This court, therefore, is not confined by *Rural West II's* decision to ground its rationale in statewide statistics.

After reconsidering *De Grandy's* discussion of proportionality and after examining the Supreme Court's recent discussion of the proper understanding of a § 2 vote dilution claim in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) (*"Shaw II"*), this court reaches the conclusion that when plaintiffs bring a claim of vote dilution that is specific to a particular region, statewide proportionality statistics by themselves have limited probative value, in that they may obscure the fact that defendants are improperly using over-proportionality in one area of the state to offset vote dilution in the challenged region of the state. Likewise, when defendants attempt to add another county to plaintiffs' challenged region, as in the instant case, over-proportionality in the added county may again conceal dilution in the plaintiffs' challenged region. Accordingly, and for the further reasons discussed below, the court limits its frame of reference for determining whether Chapter 536 improperly dilutes the plaintiffs' voting strength to the six-county region of rural west Tennessee. The court finds substantial support for its decision from the following discussions in *Shaw II* and *De Grande*.

After assuming that compliance with § 2 of the Voting Rights Act could be a compelling state interest, the *Shaw II* Court held that the North Carolina legislature's creation of District 12, a majority-black congressional district, could not satisfy strict scrutiny under the Fourteenth Amendment because it was not a narrowly

tailored remedy. *Shaw II*, 116 S. Ct. at 1905. *Shaw II's* rationale for rejecting District 12 as a narrowly tailored remedy is critical to this court's decision regarding the proper frame of reference in the instant matter:

> Appellees do not defend District 12 by arguing that the district is geographically compact, however. Rather they contend, and a majority of the District Court agreed that once a legislature has a strong basis in evidence for concluding that a § 2 violation exists in the State, it may draw a majority-minority district anywhere, even if the district is in no way coincident with the compact *Gingles* district, as long as racially polarized voting exists where the district is ultimately drawn.
>
> We find this position singularly unpersuasive. We do not see how a district so drawn would avoid § 2 liability. If a § 2 violation is proven for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *The vote dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State.* For example, if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 which spans the Piedmont Crescent would not address that § 2 violation. The black voters of the south-central to southeastern region would still be suffering precisely the same injury that they suffered before District 12 was drawn. District 12 would not address the professed interest of

> relieving the vote dilution, much less be narrowly tailored to accomplish the goal.
>
> Arguing, as appellees do and the District Court did, that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. *To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.*

Id. at 1906 (internal citations omitted) (emphasis added). If, as the Supreme Court states in *Shaw II*, a regional vote dilution injury is not remedied by creating a majority-black district outside of the challenged area, then symmetry likewise requires that the presence or absence of vote dilution in a particular region of a state cannot be determined by looking to the statistics of another region of the same state, or solely to the state as a whole.

Additionally, the rationale behind *De Grandy's* suspicion of using proportionality as a "safe harbor" for state districting schemes further supports this court's conclusion that rural west Tennessee should be analyzed independently of Shelby County and statewide statistics. The *De Grandy* Court explained:

> Even if the State's safe harbor were open only in cases of alleged dilution by the manipulation of district lines, however, *it would rest on an unexplored premise of highly suspect validity: that in any given voting jurisdiction (or portion of that jurisdiction under consideration), the rights of some minority voters under § 2 may be traded off against the rights of other members of the same*

> *minority class*. Under the State's view, the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line.

De Grandy, 512 U.S. at 1019 (emphasis added).

Although the African-American voting age population of Shelby County is 39.68%,[11] nine out of seventeen, or 52.94%, of the House districts in Shelby County are majority-black,[12] thereby exceeding proportionality in Shelby County. *Shaw II* and *De Grandy* guide this court to the conclusion that neither over-representation in Shelby County, nor substantial proportional representation at the statewide level should be used to compel an offset of potential vote dilution in rural west Tennessee generated by the absence of a majority-black district in that six-county area. *See Shaw II*, 512 U.S. at 1019 ("A balanced bottom line does not foreclose proof of discrimination along the way.") (quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992)); *see also Marylanders for Fair Representation, Inc. v. Schaeffer*, 849 F. Supp. 1022, 1049, 1064 (D. Md. 1994) (considering plaintiffs' statewide voting rights claim independently from plaintiffs' regional voting rights claim and finding

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[11] *See* Pls.' Second Request for Judicial Notice, *supra* note 5, at p. 2.

[12] Shelby County includes House districts 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98 and 99. Districts 84, 85, 86, 87, 88, 90, 91, 92 and 98 contain majority-black voting age populations. *See* Notice of Filing Chapter 536, *supra* note 6.

no violation with respect to statewide claim, while finding vote dilution with respect to a particular region of the state); *NAACP v. Austin*, 857 F. Supp. 560, 568 (E.D. Mich. 1994) (citing *De Grande* and concluding that "[t]he 'relevant population' to be used in determining proportionality depends, in each case, on the breadth of the allegations in the plaintiffs' complaint, and the geographic scope of the districts, if any, that are specifically challenged."). The court will therefore focus upon statistics specific to rural west Tennessee.

In an effort to keep Shelby County within the court's frame of reference, defendants initially contend that plaintiffs' inclusion of Shelby County in their second amended complaint precludes them from now narrowing their regional challenge.[13] Second, defendants intimate

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[13] Defendants reference the following allegations from plaintiffs' second amended complaint:

> 5. The personal plaintiffs reside in the seven-county area in West Tennessee – Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton – where new majority African-American legislative districts can be drawn.
>
> 31. African-Americans in Tennessee, including in West Tennessee, are politically cohesive, in that they tend to vote as a bloc, have common socio-economic characteristics and have organized themselves collectively for political activity.
>
> 32. Candidates for elective office preferred by African-Americans in Tennessee, including West Tennessee, are usually defeated by the white majority voting as a bloc.
>
> 40. African-Americans in Tennessee, including in West Tennessee and in rural West Tennessee, have less

that by permitting the plaintiffs to define the court's frame of reference, the court has enabled the plaintiffs to continually carve out a smaller geographic area until they achieve a voting rights violation. For the following reasons, defendants' contentions are without merit.

In response to defendants' first argument, the court finds that defendants have suffered no prejudice from plaintiffs' decision to narrow their vote dilution challenge, because the specific references to "rural West Tennessee" in plaintiffs' second amended complaint notified defendants of a vote dilution challenge to rural west Tennessee.[14] Moreover, the contention that plaintiffs may not narrow the focus of their voting rights claim is contrary to voting rights case law. *See De Grande*, 512 U.S. at 1021 (acknowledging that the district court limited its

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opportunity than other residents to participate in the political processes and to elect candidates of their choice.

[14] In addition to ¶ 40 of plaintiffs' second amended complaint, *supra* note 13, the following paragraphs from the same complaint also specifically reference rural west Tennessee:

37. The existing house redistricting in Tennessee, including in West Tennessee and in rural West Tennessee, was enacted and is being maintained purposefully to deny or abridge the right of African-Americans to vote and to participate in the political process on an equal basis with other residents of the jurisdiction on the basis of race and color.

45. The existing redististricing plan for the House of Representatives, including for West Tennessee and rural West Tennessee, results in the denial or abridgment of African-American voting strength in violation of plaintiffs' rights guaranteed by Section 2 of the Voting Rights Act.

scope to Dade County after the plaintiffs voluntarily dismissed their claims of Hispanic vote dilution outside the Dade County area); *Austin*, 857 F. Supp. at 569 n.5 (limiting scope to Wayne and Oakland Counties after plaintiffs voluntarily dismissed their vote dilution claim with respect to Kent County). This court construes plaintiffs' March 21, 1997 advisement, which expressly limited their vote dilution claim to rural west Tennessee, as a legitimate voluntary dismissal of plaintiffs' statewide and Shelby County vote dilution claims.

With respect to defendants' second argument, prior decisions show that the three *Gingles* preconditions operate to eliminate meritless claims and, thereby, check any concern that plaintiffs can continually narrow their challenged area until they achieve a vote dilution victory. *See, e.g., Askew v. City of Rome*, 127 F.3d 1355, 1381-85 (11th Cir. 1997) (affirming district court's finding of no vote dilution in the City of Rome, Georgia where plaintiffs failed to show that the white majority voted sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate); *Campos v. City of Houston*, 113 F.3d 544, 547-48 (5th Cir. 1997) (affirming district court's grant of summary judgment because Hispanic minority group was not sufficiently large and geographically compact to constitute a majority in a single-member district); *Reed v. Town of Babylon*, 914 F. Supp. 843, 867 (E.D.N.Y. 1996) (finding no vote dilution due to plaintiffs' failure to satisfy *Gingles'* compactness requirement). The court therefore restricts the geographic scope of relevant statistical data to rural west Tennessee.

V. Cross-Motions for Summary Judgment

As the court foreshadowed in its order of March 13, 1997, because defendants' grounded their motions for summary judgment solely upon the existence of proportionality at the statewide level and at a regional level inclusive of Shelby County, the court's decision to focus its inquiry on the six-county area of rural west Tennessee renders defendants' motion moot. Accordingly, the court turns its attention to the Rural West plaintiffs' motion for summary judgment.

Relying on collateral estoppel, plaintiffs argue that the court's prior findings in *Rural West I* and *Rural West II*,[15] regarding the satisfaction of the *Gingles* preconditions and several Senate Report factors, posture their present claim of vote dilution for summary judgment. Considering that in *Rural West I* and *Rural West II* the plaintiffs' regional challenge to the Senate reapportionment plan included Shelby County, the preclusive effect of those decisions may be limited in this case where Shelby County is excluded from plaintiffs' regional challenge to the House districting scheme. *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 583 (6th Cir. 1994) ("[I]ssue preclusion, or collateral estoppel, dictates that once an issue is *actually* and *necessarily* determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on different causes of

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[15] Although *Rural West II* reversed the holding of *Rural West I*, the *Rural West II* court, based on its earlier findings in *Rural West I*, concluded that the *Gingles* preconditions were still satisfied for west Tennessee, a region that includes rural west Tennessee and Shelby County. *Rural West II*, 877 F. Supp. at 1099.

action involving any party to the prior litigation.") (emphasis added). To the extent the doctrine is applicable, however, collateral estoppel could only preclude any dispute that the *Gingles* factors and several Senate Report factors were satisfied in 1993, the last time the political environment of rural west Tennessee was judicially scrutinized. Since that time, two state legislative elections have been held, the details of which could arguably change the conclusions reached in *Rural West I* concerning the satisfaction of the *Gingles* requirements, or the presence or absence of factors relevant to the balancing of the totality of the circumstances. *See Uno v. City of Holyoke*, 72 F.3d 973, 990, 992 (1st Cir. 1995) (finding that "[t]hough past elections may be probative of racially polarized voting, they become less so as environmental change occurs" and on remand allowing district court in its discretion to "permit the parties to supplement the record with additional facts (including, but not limited to, evidence gleaned from the new round of [elections] that have recently been completed)") (citations omitted); *Uno v. City of Holyoke*, 960 F. Supp. 515, 526 (D. Mass. 1997) (reversing its earlier finding of vote dilution on remand and explaining "[g]iven the most recent election, the court must conclude that, in the context of Holyoke's hybrid ward and at-large voting system for the City Council, racially polarized voting as a cause of significantly diminished opportunity for [minority] voters has not been adequately proved to exist in the city's current political scene"). Because "ultimate conclusions about equality or inequality of opportunity [in voting] were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts," *De*

Grandy, 512 U.S. at 1011, the absence of a detailed analysis of rural west Tennessee's most recent state legislative elections compels the court to conclude that genuine issues of material fact remain and, therefore, plaintiffs are not entitled to judgment as a matter of law.

VI. Conclusion

For the foregoing reasons, the court denies plaintiffs' and defendants' cross-motions for summary judgment.

IT IS SO ORDERED this 8th day of July, 1 98.

/s/ Jerome Turner
JEROME TURNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RURAL WEST TENNESSEE AFRICAN AMERICAN AFFAIRS COUNCIL, INC., et al., Plaintiffs, v. DON SUNDQUIST, GOVERNOR OF THE STATE OF TENNESSEE, et al., Defendants.	)	NO. 92-2407-TUV

PHILLIP R. LANGSDON, et al., Plaintiffs, v. RILEY DARNELL, et al., Defendants.	)	NO. 92-2415-TUV

ORDER

(Filed Nov. 6, 1998)

Plaintiffs in this consolidated civil rights action assert a claim of vote dilution pursuant to § 2 of the

Voting Rights Act, 42 U.S.C. § 1973.[1] Specifically, the Rural West Tennessee African American Affairs Council and certain registered voters in Tennessee (the "Rural West plaintiffs"), along with Phillip R. Langsdon and other registered voters in Tennessee (the "Langsdon plaintiffs") charge that Tennessee's 1994 reapportionment of its ninety-nine state House districts unlawfully dilutes African-American voting strength in rural west Tennessee, a geographic area that includes Madison, Haywood, Hardeman, Tipton, Fayette, and Lauderdale Counties. For the following reasons, the court holds that the 1994 reapportionment violates § 2 of the Voting Rights Act.

I. Background

In April of 1992, the Tennessee General Assembly passed Chapter 836 of the Acts of 1992 ("Chapter 836"), which reapportioned the state's single-member House of

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[1] A violation of 42 U.S.C. § 1973 is established if:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subdivision (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b).

Representatives and Senate districts. Prior to the 1992 primaries, the Rural West and Langsdon plaintiffs filed lawsuits challenging Chapter 836's House and Senate reapportionment plans on the grounds that they violated the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act. On September 15, 1993, a three-judge panel of this court held that Chapter 836's House districting scheme was unconstitutional because it violated the "one person, one vote doctrine under the Equal Protection Clause." *Rural West Tennessee African-American Affairs Council v. McWherter*, 836 F. Supp. 447, 452 (W.D. Tenn. 1993), *aff'd sub nom., Millsaps v. Langsdon*, 510 U.S. 1160 (1994).

In November of 1993, the same three-judge panel ruled that Tennessee's "1992 Senate reapportionment plan violate[d] § 2 of the Voting Rights Act by affording black voters in west Tennessee less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 453, 466 (W. D. Tenn. 1993) (*"Rural West I"*). The Supreme Court vacated and remanded the court's *Rural West I* decision, 512 U.S. 1248 (1994), for further consideration in light of *Johnson v. De Grandy*, 512 U.S. 997 (1994). On remand this court reversed its decision in *Rural West I* and held that the "1992 [Senate] Plan conform[ed] to the Voting Rights Act." *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1098 (W. D. Tenn. 1995) (*"Rural West II"*), *aff'd sub nom., Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 516 U.S. 801 (1995).

While the *Langsdon* and *Rural West I* appeals were pending, the Tennessee General Assembly passed Chapter 536 of the Public Acts of 1994 ("Chapter 536"), which provides a three-part reapportionment plan for Tennessee's House of Representatives, consisting of Plan A and alternative Plans B and C.[2] Plan A creates 12 majority-African-American House districts, but places none in the six county area that plaintiffs describe as rural west Tennessee. Under the terms of Chapter 536, Plan B, which creates 13 majority-African-American House districts, including one in rural west Tennessee, will take effect if this court finds that Plan A unlawfully dilutes minority voting strength.

On January 23, 1995, this court issued an order validating Chapter 536's Plan A after finding that it accorded with the Equal Protection Clause's one person, one vote requirement at issue in the prior *Langsdon* decision. This court further ordered that it would delay consideration of other challenges to Chapter 536's House plan until the Supreme Court ruled on appeals pending in the Senate case (*Rural West I* and *Rural West II*).

After the Supreme Court affirmed *Rural West II*, on January 25, 1996, the Rural West plaintiffs filed a second amended complaint challenging Plan A on the sole ground that it violates § 2 of the Voting Rights Act by

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[2] After the Supreme Court affirmed this court's ruling in *Langsdon*, 510 U.S. 1160, Plan C, which called for the reinstatement of the districting plan struck down in *Langsdon*, became moot.

diluting the voting power of blacks in Tennessee, including west Tennessee and rural west Tennessee.[3] Contending that *Rural West I* and *Rural West II* conclusively decided the facts necessary to prove that Plan A dilutes minority voting strength in rural west Tennessee, on May 6, 1996, the Rural West plaintiffs filed a motion for summary judgment on their § 2 dilution claim. In response, defendants filed cross-motions for summary judgment, similarly based on the court's prior findings, and specifically contended that: (1) Shelby County should be considered when the court engages in proportionality[4] analysis, and (2) once Shelby County is included in the court's frame of reference, the number of majority-African-American districts is substantially proportional to the black voting age population's share of the total population in the relevant seven-county area.

For the reasons set forth in its July 9, 1998 order, this court limited its geographic frame of reference for relevant statistical data to the six-county area of rural west Tennessee that includes Fayette, Hardeman, Haywood, Lauderdale, Madison, and Tipton counties.[5] This six-

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[3] Because the second amended complaint contained no constitutional claims, the three-judge court disbanded itself by order entered May 9, 1996.

[4] Under the Voting Rights Act, proportionality is "defined as the relationship between the number of majority-minority voting districts and the minority group's share of the relevant population. . . . " *Johnson v. De Grandy*, 512 U.S. 997, 1025 (1994) (O'Connor, J., concurring).

[5] The black voting age population of this six-county area is 31.01%. *See* Pls. Second Request for Judicial Notice (1990 Census Data), No. 92-2407, Docket Entry No. 29, at p. 2 (June 24, 1992) (hereinafter "Pls.' Second Request for Judicial Notice").

county area is covered by five House districts, all of which are majority white.[6] Noting the absence of a detailed analysis of Tennessee's most recent state legislative elections, the court denied all motions for summary judgment. *See Langsdon v. Darnell*, 9 F. Supp.2d 880 (W.D. Tenn. 1998). On August 26, 1998, the court held a trial on the merits on the plaintiffs' consolidated claim of vote dilution.

II. Rural West I and Rural West II

As referenced above, in *Rural West I* and *Rural West II*, a three-judge panel of this court considered whether Tennessee's Senate districting scheme violated § 2 of the Voting Rights Act. To determine whether the Senate plan diluted black voting strength, the *Rural West I* and *Rural West II* courts focused upon Shelby County and the same rural, six-county area as in the matter at bar. *Rural West I*, 836 F. Supp. at 455. Because both plaintiffs and defendants substantially rely upon the factual findings and

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[6] Under Plan A, five majority-white House districts include the six counties of rural west Tennessee in the following manner: House District 72 contains a substantial part of Madison County; House District 73 is located entirely within Madison County; House District 80 includes portions of Fayette and Hardeman Counties; House District 81 includes part of Fayette County and all of Tipton County; and House District 82 includes part of Hardeman County and all of Haywood and Lauderdale Counties. *See* Notice of Filing Chapter 536 of the Public Acts of 1994 and other Related Documents; District Statistics Report of Chapter 536 of the Public Acts of 1994, No. 92-2407, Docket Entry No. 129 (Jan. 25, 1994) (hereinafter "Notice of Filing Chapter 536").

rationale of these two decisions, the court is compelled to review them.

Although the Supreme Court vacated *Rural West I*'s finding of vote dilution with instructions to reconsider in light of *Johnson v. De Grandy*, 512 U.S. 997 (1994), the *Rural West II* court, on remand, reinstated its prior findings of fact from *Rural West I* before reevaluating its earlier decision. *See Rural West II*, 877 F. Supp. at 1099 ("We note at the outset that we believe all of our factual findings in *Rural West I* to be correct. . . . "). As a result, the court first turns to the factual findings of *Rural West I*.

The *Rural West I* court initially determined that the plaintiffs easily satisfied the first two preconditions for success on a vote dilution claim as set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986).[7] Turning to the third *Gingles* precondition, "based solely upon the black-white state legislative elections in west Tennessee," the court found a "high level of white bloc voting which usually enables the majority to defeat the black community's candidate of

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[7] In *Gingles*, the Supreme Court held that plaintiffs must at a minimum satisfy the following three-part test before a court may inquire further into their voting rights claim:

1. The plaintiffs must demonstrate that the protected group is sufficiently large and geographically compact that it could constitute an effective majority in a single-member district.
2. The plaintiffs must show that the protected group is politically cohesive.
3. The plaintiffs must show that the majority votes sufficiently as a bloc to enable it usually to defeat the protected group's preferred candidate.

478 U.S. at 51.

choice."[8] *Rural West I*, 836 F. Supp. at 457-58. In reaching this conclusion, the court made specific findings concerning seven state legislative elections in the same rural six county area at issue in the instant matter:

> In six of the seven rural county elections there was voter polarization based upon race, and in five of the elections the level of polarization was overwhelming. White support of black candidates was particularly low, with only one black candidate receiving more than 10% of the white vote. No black candidate won any of the state legislative elections held in rural west Tennessee.

Id. at 457.

The court indicated several reasons why the white-white elections were less probative than black-white contests. Evidence showed that blacks were discouraged from running in majority-white districts because high white cohesion made a black candidacy futile. *Id.* at 459. In addition, past discrimination had denied blacks the valuable benefits of incumbency. The court also noted that in at least half of the elections in which the black preferred candidate won, that candidate was also overwhelmingly supported by whites, indicating that only one viable candidate existed. *Id.* at 459. In light of all these factors, and the absence of evidence showing whether any candidates in the white-white elections were sponsored by the black community, the court found that "in Tennessee black-white elections are more probative of

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[8] A black-white election refers to an election where at least one candidate was black and at least one was white.

racial bloc voting than are white-white elections, and that black-white elections indicate white bloc voting which usually enables the majority to defeat the black community's candidate of choice." *Id.* at 460.

Having found the three *Gingles* preconditions satisfied, the court, as required by § 2 of the Voting Rights Act, then examined the totality of the circumstances to determine whether the Senate districting plan gave "west Tennessee black voters 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Id.* at 460. Applying the list of factors set out in the Senate Report on the 1982 amendments to the Voting Rights Act,[9] the

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[9] The Senate Report factors that are relevant to the evaluation of the totality of the circumstances under the Voting Rights Act are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the

Rural West I court initially found strong evidence of the second Senate Report factor from its earlier findings regarding significant polarized voting in black-white state legislative elections. The court then found that "in west Tennessee there is a history of official discrimination against blacks in voting which has present-day effects, and that official discrimination in voting is not entirely in the past." *Id.* at 461. In reaching this finding, the court again made rather lengthy observations specific to the rural six-county area at issue in the instant case:

> More recently, the political gains by black citizens during the civil rights movement of the 1950's and 60's were accompanied by increased official discrimination in voting. Government

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effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

9. whether the policy underlying the state or political subdivision's use of the challenged voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See Gingles, 478 U.S. at 36-37, 44-45 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 28-30, reprinted in 1982 U.S.C.C.A.N. 177, at 206-08).

officials manipulated voter registration requirements to discourage black voters, and supported or initiated physical and economic intimidation of those blacks who did manage to register. The strongest example of economic intimidation was the eviction of more than 400 black sharecropping families, most of them in Fayette County, after the 1960 election. These evictions were made possible by registrars who would inform sheriffs of the names of blacks who had registered to vote; the sheriffs would then inform white landowners who would evict black tenants who had registered. These mass evictions led to the formation of two "tent cities" for displaced sharecroppers, one in Fayette County and one in Haywood County. The tent cities became national symbols of the struggle of west Tennessee blacks for equal access to the polls.

Although overt official discrimination against black voters has declined significantly since the 1960's, at least one federal court has found evidence of intentional discrimination against black candidates and voters in west Tennessee. In *Taylor v. Haywood County*, 544 F. Supp. 1122 (W.D. Tenn. 1982), the district court enjoined Haywood County from changing its Board of Highway Commissioners election system from district elections to a countywide at-large election. The court found that the change in the number of districts from 10 to 9, which necessitated the change to an at-large election scheme, was "a result of the purposeful intention to dilute black voting strength in Haywood County, Tennessee." *Id.* at 1131. In Hardeman County in 1983 a lawsuit was filed against the City of Bolivar challenging an amendment to the City Charter providing for a mayoral runoff

> election if no mayoral candidate received a majority of the votes. *Bills v. Alexander*, Civ. Act. No. 83-1220 (W.D. Tenn.). The plaintiffs alleged that the City had amended its Charter in response to the success of two black candidates for mayor in 1981. The district court approved a class action settlement setting up a new "system which will ensure the opportunity of black citizens of Bolivar to meaningfully participate in the political process." These cases challenging newly adopted election systems indicate to the court that official discrimination against blacks in voting is not entirely a thing of the past in west Tennessee.

Id. at 460-61. Because the Senate Report recognizes that "educational and economic disadvantages can translate into political disadvantage," the *Rural West I* court also examined those factors and concluded that black citizens in west Tennessee are more likely than white citizens "to live in poverty, to be unemployed, and to live in substandard housing." *Id.* at 461. Additionally, "[b]lack citizens are less likely to have completed high school, to own their own homes, to have access to a car, or to have telephones in their homes." *Id.* at 461-62.

With these findings in mind, the *Rural West I* court then measured the proportionality of black representation in the Senate districting plan. Using statewide statistics, the court determined that because majority-black Senate districts constitute only 9.1% of total Senate districts, and because no black candidate had ever won a seat in a majority-white district, Tennessee African-Americans, who constitute 14.4% of Tennessee's voting-age population, were unlikely to achieve electoral success in the

state senate equal to their proportion of the Tennessee voting age population without an additional majority-black Senate district. *Id.* at 463. While recognizing that "the level of black electoral success is merely a factor to be considered, and that blacks are not guaranteed proportional representation by § 2," the *Rural West I* court ultimately concluded that the totality of circumstances warranted a finding of unlawful black vote dilution in Tennessee's Senate districting scheme. *Id.* at 463, 466. The Supreme Court vacated this holding and instructed the three-judge panel to reconsider its analysis in light of the Court's recent decision in *De Grandy*, 512 U.S. 997.

On remand, the *Rural West II* court concluded that the plaintiffs still satisfied all three *Gingles* preconditions and several Senate factors for the same reasons set forth in *Rural West I*. However, *Rural West II* nonetheless reversed the court's earlier finding of black vote dilution in Tennessee's Senate reapportionment plan. *Rural West II*, 877 F. Supp. at 1111. Central to the court's decision was its conclusion, based upon *De Grandy*, that proportionality is not the absolute measure of voting equality.[10] Rather, because "the phrase 'elect representatives of their choice' may be read as meaning having the ability to influence the outcome of an election," a minority group's ability to influence elections is also critical to a determination of whether that minority's voting strength has

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[10] *See De Grandy*, 512 U.S. at 1020 ("[T]he degree of probative value assigned to proportionality may vary with other facts."); *see also id.* at 1026 (O'Connor, J., concurring) ("In sum, the Court's carefully crafted approach treats proportionality as relevant evidence, but does not make it the only relevant evidence.").

been diluted by a particular reapportionment scheme. *Id.* at 1103. As the *Rural West II* court explained, because a "minority population that votes as a bloc (as required by the second *Gingles* precondition) and comprises at least 25% of the voting-age population in an electoral district will have significant influence on candidates in virtually every election," a minority group gains sufficient influence within a district for recognition under § 2 when the minority composes 25% to 55% of the voting-age population in the district. *Id.* at 1104-05. The *Rural West II* court, therefore, decided to forego particularized inquiries into racial polarization, the outcomes of individual elections, and the ability of black voters to build coalitions within individual districts and, instead, established a bright-line rule that made any district with a black voting-age population between 25% and 55% an influence district for totality of the circumstances analysis under the Voting Rights Act.

With the new-found relevance of influence districts in the calculus of the totality of the circumstances, the three-judge panel determined that it had overemphasized the importance of proportionality in its earlier decision and decided that the particular combination of majority-black districts and influence districts in the 1992 Senate Plan precluded a § 2 violation. *Id.* at 1108-09. In essence, the inclusion of influence districts in the court's analysis compensated for the otherwise detrimental absence of proportionality. *See id.* at 1109 ("Were there no influence districts included in the 1992 Plan, the lack of proportionality in this case combined with other factors would be sufficient to find that § 2 had been violated."). The *Rural West II* court, however, was careful "not [to] imply

that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts [because] [u]nder current doctrine, the facts in this case require some majority-minority districts." *Id.* at 1107 n.11.

In determining that the Senate plan did not dilute black voting strength, the *Rural West II* court focused upon statewide data, but considered a regional frame of reference as well. On the statewide level, where blacks comprise 14.4% of the voting-age population, the three majority-black districts and the three influence districts combined to constitute 18.2% of Tennessee's thirty-three Senate districts. At the seven-county, regional level, where blacks comprise 37.9% of the voting-age population, the area's two majority-black districts and two influence districts combined to constitute 50% of the eight districts at least partially included in the region. The court therefore found that under either geographic scope, the combination of majority-black districts and influence districts, under the totality of the circumstances, precluded a finding of black vote dilution. *See id.* at 1110 ("In sum, a consideration of the seven-county region alone does not change the outcome of our decision today.").

III. Analysis

A. The Gingles Factors

With the saga of the prior litigation summarized, the court turns to the present action. The parties have stipulated that blacks in rural west Tennessee are sufficiently numerous and geographically compact to satisfy the first *Gingles* precondition. Additionally, revised stipulation

#19 in the parties' revised stipulations of facts states that black voters in rural west Tennessee are politically cohesive. Thus, the parties agree that the first two *Gingles* preconditions are met.

There is a dispute, however, over the third precondition – whether white bloc-voting usually defeats the minority-preferred candidate. The dispute arises due to the parties' differing opinions concerning the proper scope of the court's inquiry. Plaintiffs seek to emphasize legislative elections involving candidates of different races. Defendants, on the other hand, believe the court should give equal weight to elections involving only white candidates, and should examine other elections held at the county level not involving the state legislature.[11]

An examination of past election results shows that the court's resolution of this scope issue has the potential of being outcome determinative. The plaintiffs' expert, Dr. Cole, analyzed eleven black-white legislative elections and found the black preferred candidate lost nine (82%) of those contests. The results of the defendants' experts, Dr. Gant and Dr. Lyons, is similar for black-white legislative contests. They found minority vote dilution in nine of ten (90%) elections.[12] Thus, if the court were to

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[11] The parties have referred to the legislative contests as endogenous elections, and the other elections as exogenous. For sake of convenience, the court will adopt these labels.

[12] Unlike Dr. Cole, the defendants' experts did not analyze the 1974 House District 73 election. of the elections analyzed by both sides' experts, the only difference centered around the 1988 three-way election for Senate District 26. While Dr. Cole's

limit its examination to black-white legislative contests, it is clear that the third *Gingles* precondition would be satisfied.

The inclusion of white-white legislative contests blurs the result somewhat. The defendants' experts found that the preferred candidate of blacks was defeated 52.38% (11 of 21) of the time in all legislative elections from 1986-1994.[13] Therefore, if the court were to weigh black-white and white-white elections equally, the black preferred candidate is usually defeated, but a difference in one election would change that result.

To increase the amount of data available, the defendants' experts further widened their analysis to include county-wide elections from 1986-1996. For black-white contests during that time period, they found the black preferred candidate was defeated 13 out of 24 (54%) times. For white-white county-wide elections, the black preferred candidate lost 6 out of 26 (23%) times. Therefore, if the court were to give these elections equal weight, the total would show the black preferred candidate losing 18 out of 50 (36%) county-wide elections.

If all of the county-wide elections are combined with all of the legislative elections and given equal weight, the

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calculations indicate that African-Americans preferred the elected candidate, the numbers of Dr. Gant and Dr. Lyons show that the plurality of blacks voted for a defeated candidate. All of the experts agreed that this difference was probably due to differences in statistical calculation methods.

[13] Dr. Cole did not analyze white-white elections prior to 1994. His post-1994 results mirrored those of Drs. Lyons and Gant.

results show the black preferred candidate losing 29 of the 71 (41%) elections. It is evident, therefore, that the court's decision as to whether whites generally vote as a bloc to defeat the black preferred candidate will turn on how much weight the court affords the white-white and exogenous elections.

Prior case law has provided some guidelines but no firm dictates on the question. The Sixth Circuit has clearly indicated that a court must at least consider elections involving only white candidates. *See Cousin v. Sundquist*, 145 F.3d 818, 825 (6th Cir. 1998). This does not mean, however, that a court should be blind to the race of candidates. As the Sixth Circuit noted in *Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994), § 2's "guarantee of equal opportunity is not met when . . . 'candidates favored by blacks can win, but only if the candidates are white.' " 40 F.3d at 812 (quoting *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge panel)). In fact, *Cousin* implicitly recognizes that races involving only white candidates, while relevant, are not typically as relevant as black-white elections.

> [W]e do not foreclose the consideration of electoral races involving only white candidates where the record indicates that one of the candidates was strongly preferred by black voters. . . . Where black voters have a genuine candidate of choice in an election involving only white candidates, then the results will be relevant to the question of whether racial bloc voting enables the white majority usually to defeat the minority's preferred candidate.

Cousin, 145 F.3d at 825 (quoting *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc)). In *Cousin*, the Sixth Circuit made it clear that it does not expect all white-white elections to be relevant, but where the record indicates they are, the district court must consider them. Therefore, while a court in this circuit must consider white-white elections, it should place primary reliance on the elections involving a minority candidate.

This understanding of *Cousin* and *Clarke* parallels the decisions of most of the other circuits that have dealt with this issue. As indicated above, the Eleventh Circuit in *Nipper* noted that white-white elections can be relevant. However, the court specifically held that "the most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving black candidates." *Nipper*, 39 F.3d at 1540; *see also Davis v. Chiles*, 139 F.3d 1414, 1417 n.5 (11th Cir. 1998) (noting that while analysis of white-white elections is relevant, evidence from black-white elections is more probative). Similarly, the Fifth Circuit has "consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates . . . [because] such elections do not provide minority voters with the choice of a minority candidate." *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc). This view predominates in the other circuits as well. *See, e.g., Uno v. City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995) ("Although the VRA does not require for a successful section 2 showing that minority-preferred candidates be members of the minority group, elections in which minority candidates run are often especially probative on the

issue of racial bloc voting.") (citations omitted); *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir. 1993) ("As a general matter, we believe that elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates."). In fact, at trial all of the experts agreed that black-white elections are the most relevant.

The problem, of course, is that neither case law nor science provides the court with an objective way to weigh white-white elections against black-white elections. The court is therefore left to assess the relevance of each type of election on a case-by-case basis. In some exceptional cases, the evidence may show that certain white-white elections should be given substantially equal weight because one of the candidates was openly sponsored or endorsed by the African-American community. Additionally, where the sample size of black-white elections is particularly small, it may be necessary to place substantial reliance on the white-white races. On the other hand, if the record contains results from numerous black-white elections, relying heavily on white-white elections may distort the picture, not complete it. This is especially true where, as in this case, the level of white cohesion in the legislative contests increases dramatically from 59% in white-white elections to 86% in black-white elections. This increase in cohesion, which all of the experts acknowledged, shows that when a black candidate is in a race, whites are even more likely to vote as a bloc to

defeat the black preferred candidate.[14] "When white bloc voting is 'targeted' against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race." *Clarke*, 40 F.3d at 812. Although the court is cognizant of the Supreme Court's reminder that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground," *De Grandy*, 512 U.S. at 1020, a reading of the third *Gingles* factor which allows whites to block minorities from electing any preferred candidate of their own race is not a guarantee of equal opportunity. According to the experts, in about 90%[15] of the black-white legislative races, the black candidate received a majority or plurality of black votes. In each of these contests, the black-preferred black candidate lost. This evidence of white bloc voting directed specifically at black candidates leads the court to conclude that it should place primary emphasis on the results of the black-white contests.[16]

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[14] This court acknowledges that a black candidate is not always the black-preferred candidate. However, it refuses to ignore the reality that many voters tend to vote along racial lines. The evidence in this case is consistent with that reality.

[15] Drs. Lyons and Gant analyzed ten interracial contests and found blacks supported the black candidate in nine of those races. Dr. Cole analyzed eleven interracial elections and concluded that blacks supported the black candidate in nine of those contests.

[16] As the court noted in *Rural West I*, blacks may be discouraged from running because they see a black candidacy in a majority white district as a futile gesture. *Rural West I*, 836 F.Supp. at 459. This prevents the black community from sponsoring and electing their preferred candidate. Thus, "[i]t

It is also necessary to determine what weight to give the county-wide exogenous elections. The parties stipulated that the legislative elections were the most legally significant. Considering that the court has before it evidence from twenty-one legislative elections that date as far back as 1976 and exhibit consistent results, the need for exogenous elections is questionable at best. *See, e.g., Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994) ("[E]lections involving the particular office at issue will be more relevant than elections involving other offices.") (citation omitted); *Cf. Jenkins*, 4 F.3d at 1134 (permitting use of exogenous elections where endogenous evidence is scarce); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) ("Although exogenous elections alone could not prove racially polarized voting . . . the district court properly considered them as additional evidence of bloc voting – particularly in light of the sparsity of available data."). Because of the prevalence of endogenous data, the court does not find the exogenous elections to be particularly useful or necessary. Certainly, "the voting patterns in exogenous elections cannot defeat evidence, statistical or otherwise, about [endogenous] elections. . . . " *Cofield v. City of Lagrange*, 969 F.Supp. 749, 773 (N.D. Ga. 1997).[17]

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would not make sense to allow data from white-white elections in majority-white districts, in which potential black candidates viewed black candidacies as futile, to overcome evidence of white bloc voting in black-white elections in districts in which black candidates felt they stood a fighting chance." *Id.*

[17] While the defendants' experts performed analysis on both endogenous and exogenous elections, they testified that exogenous elections are of limited value.

Having determined that black-white legislative contests deserve the most weight, the court concludes that the third *Gingles* precondition is satisfied. According to the experts, in these interracial legislative elections white bloc voting defeats the minority-preferred candidate at least 82% of the time. In light of its limited probativeness, the white-white and exogenous evidence is simply insufficient to overcome the overwhelming evidence garnered from the most relevant black-white legislative elections. The court therefore holds that the plaintiffs have made a showing sufficient to satisfy the third *Gingles* precondition.

B. Totality of the Circumstances

As the three *Gingles* factors are necessary but not sufficient proof of vote dilution, the court must now evaluate the totality of the circumstances in rural west Tennessee. In performing this inquiry, the court follows *De Grandy*'s admonition that "[n]o single statistic provides courts with a short-cut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *De Grandy*, 512 U.S. at 1020-21.[18]

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[18] The *De Grandy* Court further explained that:

> "[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision."

De Grandy, 512 U.S. at 1021 n.17 (quoting *Gingles*, 478 U.S. at 94-95 (O'Connor, J., concurring)). The amorphous nature of this totality of the circumstances inquiry has led to criticism to

The court turns first to the factors listed in the Senate Report to the 1982 amendments.[19] In doing so, the court recognizes that these factors are not exclusive determinants and the court remains free to consider such other evidence as it deems relevant. *See De Grandy*, 512 U.S. at 1010-11. Based on the totality of the circumstances, the court finds that Chapter 536 violates § 2 of the Voting Rights Act by affording African-Americans in rural west Tennessee less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.

1. Lack of Electoral Success and Polarized Voting

The Supreme Court has stated that the most important Senate Report factors bearing on a § 2 violation are the extent to which minority group members have been

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which this court is sympathetic. *See Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) (Posner, Chief Judge) ("Section 2 unfortunately provides no guidance on how to balance the factors and thus determine whether a challenged plan needlessly impairs a minority group's voting power. The statute tells the courts to consider 'the totality of the circumstances,' and that has turned out to be, if anything, worse than useless advice, as it has discouraged the Supreme Court from trying to particularize the standard.") (citation omitted); *Uno v. City of Holyoke*, 960 F.Supp. at 515, 518 (D. Mass. 1997) ("[T]he Voting Rights Act and its interpretative decisional authority offer awkward tools for such a delicate job. Applying this cumbersome, almost paradoxical statute in such an important area is analogous to performing heart surgery with a butter knife.").

[19] For a listing of the factors see, *supra*, note 9.

elected to public office in the jurisdiction and the extent of racial polarization in voting. *See Gingles*, 478 U.S. at 51 n.15. Both of these factors were mentioned above but each deserves further development as part of the court's totality of the circumstances analysis.

Although eleven of the legislative elections analyzed by the experts had a black candidate, not one African-American was elected to the state legislature from the six-county area.[20] The court finds this evidence very compelling. Black candidates fared slightly better in the exogenous county-wide elections. Out of twenty-four elections which included a black candidate, seven blacks were elected. Even that amount of success is slightly misleading, however, because in two of those victories there were multiple white candidates which split the white vote and allowed the African-American to win. Additionally, the success of blacks at the county level does not equate with success at the state level. The court finds that the overall lack of success of black candidates weighs heavily in favor of a finding of vote dilution.

The extent of racially polarized voting also counsels a finding of vote dilution. Because blacks are a minority in all the House districts in rural west Tennessee, if voting is polarized blacks will generally be unable to elect representatives of their choice. All of the experts at trial agreed that voting is polarized. The numbers of the defendants' own experts show that voting was polarized in 90% of the

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[20] The House districts which are located in the six-county area have the following black voting age populations: District 72 – 10%; District 73 – 37%; District 80 and District 81 – 29%; District 82 – 41%.

black-white legislative elections. Even when the white-white legislative elections are included in the calculation, 71% of the elections show racial polarization.[21] Thus, in the two areas noted by the Supreme Court to be most important in the totality of the circumstances analysis, minority electoral success and voter polarization, the evidence strongly supports a finding of vote dilution. *See Clark v. Calhoun County*, 88 F.3d 1393, 1398 (5th Cir. 1996) (finding black vote dilution and explaining that "[i]n short, the presence of racially polarized voting and the virtually complete absence of black elected officials in county offices provides striking evidence of vote dilution in Calhoun County"); *Harvell v. Blytheville School District #5*, 71 F.3d 1382, 1390 (8th Cir. 1995) (explaining that in finding vote dilution "[t]he two primary factors considered in our totality analysis are the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme.").

2. Prior Discrimination

The *Rural West I* court made specific findings regarding the history of official discrimination in voting in western Tennessee. This court takes judicial notice of those findings. *See Hastert v. State Bd. of Elections*, 777 F.Supp. 634, 650 (N.D. Ill. 1991).[22] The Sixth Circuit in

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[21] The court notes further that even if the analysis also included all of the exogenous elections, polarized voting occurred in 62% of the contests.

[22] *Hastert* was a congressional districting case. The three-judge district court considered the court of appeals' findings of historical discrimination against Hispanics in a prior municipal

Cousin indicated that general accounts of past discrimination should not garner much weight where the most recent "30 years have been marked by a complete absence of official discrimination against blacks' voting rights. . . . " *Cousin*, 145 F.2d at 832. However, while the *Rural West I* court recounted numerous official acts of discrimination from the more distant past, including slavery and Reconstruction, it also made clear that there have been voting rights violations by public officials in rural west Tennessee as late as the 1980's. *Rural West I*, 836 F.Supp. at 461. Official discrimination not only prevents blacks from electing representatives of their choice, it also leads to disillusionment, mistrust, and disenfranchisement. These feelings last beyond the current election, and can cause black voters to drop out of the political process and potential black candidates to forgo an election run.

Moreover, the court in *Rural West I* found that blacks suffered the effects of discrimination in such areas as education, employment, and health.

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districting case because "the proposed Hispanic majority congressional district [was] essentially coterminous with the Hispanic community and population discussed [in the prior court of appeals case]." Specifically, the *Hastert* court reasoned:

> This judicially recognized history of discrimination, both past and present, against the Chicago Hispanic community and its attendant impact on effective political participation and representation, as evidenced in [the prior court of appeals case], satisfies this court that a Hispanic majority district is warranted under *Gingles*.

Hastert, 777 F.Supp. at 650.

> In west Tennessee, black citizens are more likely than white citizens to live in poverty, to be unemployed, and to live in substandard housing. Black citizens are less likely to have completed high school, to own their own homes, to have access to a car, or to have telephones in their homes. As the Senate Report recognizes, educational and economic disadvantages can translate into political disadvantage.

Id. at 461-62. Money has a prominent role in American politics. Campaigning is expensive and all candidates are aware of the need to raise money. Financed electorate groups can exert influence by sponsoring their own candidate or gaining the ear of another through contributions. The economic and educational isolation of African-Americans described by the *Rural West I* court limits their ability to fund and mount political campaigns. In this sense therefore, blacks are not able to equally participate in the political process.

3. Responsiveness of Public Officials

The defendants offered the testimony of Representative Page Walley (District 80) and Representative Matt Kisber (District 73) to show the responsiveness of the Tennessee House of Representatives to the needs of minorities. Each legislator cited numerous initiatives taken in his district as a result of appropriations directed towards helping the minority community. They also noted that African-Americans hold various leadership positions within the House. Furthermore, both Representatives indicated that they campaign vigorously in African-American communities and are cognizant of their

need for support from those communities. The court believes that this testimony shows that the Tennessee House of Representatives is aware of the need to be responsive to the black community.

4. State Policy Underlying the Districting Plan

The state has argued that it has a policy underlying the present districting scheme which is not tenuous. Specifically, it argues that the lack of a majority black district in rural west Tennessee results from the state's desire to prevent the fracturing of certain cities, and in particular Jackson, into different districts. Maintaining municipal boundaries is a legitimate criteria to consider when drawing district lines. However, the House District Maps submitted by the state make it clear that Jackson is already split under the current plan. Thus, any further splitting of Jackson required by Plan B would be a change in degree, not in kind. In addition, the state's interest in maintaining municipal boundaries is simply insufficient alone to overcome the other factors discussed.

5. Miscellaneous Senate Report Factors

The court will briefly mention the remaining Senate Report Factors. No evidence was presented to show that the state uses suspect electoral practices or procedures, such as unusually large districts or majority vote requirements. There was also no evidence of overt or subtle racial appeals in political campaigns. Finally, there is not a slating process or other mechanism used in state legislative contests to prevent minority candidacies.

6. Proportionality

" 'Proportionality' . . . links the number of majority-minority voting districts to minority members' share of the relevant population." *De Grandy*, 512 U.S. at 1014 n.11. The black voting age population in the six-county region relevant to the case at bar is 31.01%. Therefore, if proportionality existed, approximately 31% of the House districts in rural west Tennessee would include a majority black population. As noted above, however, *none of* the five House districts that include the six-county area are majority black.

The Supreme Court has clearly held that proportionality is not a determinative factor but is properly considered as part of the totality of the circumstances. *See id.* at 1020 ("[T]he degree of probative value assigned to proportionality may vary with other facts."); *see also id.* at 1025 ("The [majority] opinion's central teaching is that proportionality . . . is always relevant . . . but is never itself dispositive.") (O'Connor, J., concurring).

In *De Grandy*, the Court found that the district court erred in finding that dilution was present because the state had failed to maximize the number of majority-minority districts. *Id.* at 1022. As the Court explained, the substantial proportionality[23] between the percentage of majority-Hispanic districts and the Hispanic voting-age population in Dade County demonstrated that Florida's

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[23] Substantial proportionality exists when the legislature has created the maximum number of majority-minority districts possible without exceeding proportionality. *See De Grandy*, 512 U.S. at 1013-15.

new districting scheme would "thwart . . . not encourage or perpetuate" Dade County's tendency to exclude Hispanics from the political process. *Id.* at 1014. Considering the existence of substantial proportionality, the Supreme Court deemed the district court's ordering of an additional majority-Hispanic district in Dade County an improper maximization of majority-Hispanic districts. *Id.* at 1016 (" [R]eading the first *Gingles* condition in effect to define dilution as a failure to maximize in the face of bloc voting . . . causes its own dangers, and they are not to be courted.").

The circumstances in rural west Tennessee clearly contrast those in Dade County. The substantial proportionality that precluded a finding of vote dilution in *De Grandy* is simply not present in rural west Tennessee where no majority-black district exists. Considering that the black voting-age population of rural west Tennessee is 31.01%, the requirement of a majority-black district in that area, which would make only 20% of the House districts in that area majority-black, ought not be viewed as an improper attempt to maximize majority-minority districts, but as a minimal requirement for the political equality of black voters in that six-county area.[24]

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[24] As this court noted in its order denying summary judgment, statistics from the relevant region, as opposed to state-wide calculations, are the most probative when examining proportionality. *See Langsdon*, 9 F.Supp.2d at 885-86. However, the court notes that with the creation of an additional black majority district, the state-wide percentage of majority-minority districts will rise from 12.12% to 13.13%. At the state-wide level, black voters comprise 14.4% of the voting-age population. Thus, even on a state-wide level, the creation of an additional

7. Influence Districts

Because four of the five House districts that are at least partially included in the six-county area of rural west Tennessee have African-American voting-age populations in excess of 25%, *Rural West II* requires the court to label those four districts as "influence districts" and consider them in its examination of the totality of the circumstances as well. *See Rural West II*, 877 F.Supp. at 1106-07 (requiring inclusion of influence districts in evaluation of the totality of circumstances). Sensing that the inclusion of influence districts in the totality of circumstances of rural west Tennessee endangers their claim of vote dilution,[25] plaintiffs argue that the unique circumstances of the instant case deem the existence of influence districts in rural west Tennessee irrelevant and cite footnote 11 of *Rural West II* to support their position.

Footnote 11 cautions:

> We do not imply that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts. Under

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majority-minority district would not exceed substantial proportionality.

[25] Indeed, it was the consideration of influence districts in *Rural West II* that saved Tennessee's Senate plan from violating § 2 of the Voting Rights Act, despite the plaintiffs' satisfaction of the *Gingles* factors, proof of several Senate Report factors, and demonstration of no proportionality. *See Rural West II*, 877 F.Supp. 1106-07, 1111 ("Nonetheless, were we still prevented from recognizing the existence of influence districts, we would reinstate our previous holding.").

> current doctrine, the facts in this case require some majority-minority districts.

Id. at 1107 n.11. From this notation, plaintiffs extrapolate that the relevance of influence districts in the evaluation of the totality of circumstances, as seen in *Rural West II*, is not triggered until the defendants demonstrate that at least "some majority-minority districts" exist in the challenged region. Relying on this premise, plaintiffs contend that because no majority-black districts exist in the challenged six-county area, the presence of influence districts in rural west Tennessee should have no relevance in the instant case.

The court, however, must reject plaintiffs' understanding of the relevance of influence districts in this case. *Rural West II* did not purport to set forth any limitation on the consideration of influence districts in the totality of the circumstances of discrete regional claims of vote dilution. Rather, the context of footnote 11 reveals that the *Rural West II* court was simply stating that Tennessee's statewide Senate districting scheme must contain some majority-black districts. Accordingly, as required by the holding of *Rural West II*, the court will weigh the presence of rural west Tennessee's four influence districts in its evaluation of the totality of circumstances.

However, the precise probative value of influence districts, like any other consideration in a vote dilution claim, depends upon the totality of circumstances. *Cf. De Grandy*, 512 U.S. at 1020 ("[T]he degree of probative value assigned to proportionality may vary with other facts."). Although the court disagrees with plaintiffs' contention that rural west Tennessee's influence districts should

have no relevance in the matter at bar, the court finds that the absence of a single majority-black district in the six-county region combined with the circumstances discussed above compels this court to attach less probative significance of the area's influence districts.

In reaching this conclusion, the court acknowledges, as noted earlier, the Supreme Court's admonition in *De Grandy* that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *De Grandy*, 512 U.S. at 1020. The court, however, is also cognizant of the Supreme Court's recognition in *De Grandy* that "manipulation of district lines can dilute the voting strength of politically cohesive minority group members . . . by fragmenting the minority voters among several districts where a bloc-voting majority can routinely out-vote them." 512 U.S. at 1007 (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993) ("Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory.")). Without a particularized, and no doubt unwieldy, inquiry into the ability of rural west Tennessee black voters to actually "influence" the political process in the region's specific districts, which *Rural West II* forewent in exchange for a

bright light rule,[26] it is extremely difficult to determine at what point the presence of these districts with sufficient minority populations to be labeled an "influence district" truly begin to demonstrate political equality, rather than unlawful minority vote fragmentation.

In balancing the totality of circumstances in rural west Tennessee, however, the court finds guidance from the fact that under both the statewide and regional analysis conducted in *Rural West II*, it was the combination of majority-black districts and influence districts that precluded a finding of black vote dilution. *Id.* at 1106-07, 1110. With no majority-black district in the six-county area, and overwhelming evidence of polarization and white bloc-voting, the situation in rural west Tennessee simply does not replicate the non-diluted combination present in *Rural West II*. Therefore, despite the fact that *Rural West II* labels four of the five House districts included in rural west Tennessee as "influence districts," the totality of circumstances, including overwhelming racial polarization in voting, historical, but aging, official discrimination on the basis of race, the failure to elect a single black candidate to state legislative office, the continuing effects of "discrimination in education and employment,[27] and the absence of a single majority-black

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[26] Considering that the Supreme Court affirmed the three-judge panel's decision in *Rural West II* to adopt a standard rule for determining the existence of an influence district, this court is not inclined to revisit *Rural West II*'s decision in that regard. *But see Uno*, 72 F.3d at 990-91 (declining to follow *Rural West II*'s standard rule and opting for a particularized inquiry).

[27] *See Stabler v. County of Thurston*, 129 F.3d 1015, 1023 (8th Cir. 1997) (affirming that disparate socio-economic status of

district in a six-county area that contains a black-voting age population of 31% and includes five House districts, compels this court to find that Plan A of Chapter 536 unlawfully fragments and thereby dilutes black voting strength in rural west Tennessee. The remedy for this Voting Rights Act violation is the creation of a majority-black district in rural west Tennessee.

C. Compliance with the Voting Rights Act and Racial Gerrymandering

Upon a finding of vote dilution, "it is a fundamental tenet of voting rights law that, time permitting, a federal court should defer in the first instance to an affected state's or city's choice among legally permissible remedies." *Uno*, 72 F.3d at 992. As discussed above, anticipating the potential for a judicial finding of black vote dilution, the Tennessee legislature constructed a majority-black House district in rural west Tennessee to take effect in the event Plan A violates the Voting Rights Act. The court, of course, is aware that the implementation of Plan B, necessitated by this order, may implicate the Equal Protection Clause of the Fourteenth Amendment. *See Bush v. Vera*, 517 U.S. 952 (1996) (requiring strict scrutiny when race is the predominant factor in the creation of a legislative district); *Shaw v. Hunt*, 517 U.S. 899 (1996). However, the court declines to address Plan B's compliance with the Equal Protection Clause at this time as no arguments concerning Plan B have been heard, nor has any party

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minority group was causally connected to minority's depressed level of political participation).

alleged that Plan B constitutes an unconstitutional racial gerrymander.[28]

IV. Conclusion

For the foregoing reasons, the court finds that Plan A of Chapter 536 violates § 2 of the Voting Rights Act because it dilutes African-American voting strength in rural west Tennessee.[29]

IT IS SO ORDERED this 5th day of November, 1998.

/s/ Jerome Turner
JEROME TURNER
UNITED STATES
DISTRICT JUDGE

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[28] The court notes that the Rural West plaintiffs have not indicated any opposition to Plan B. The amended complaint of the Langsdon plaintiffs alleges that all of Chapter 536, including Plan B, constitutes illegal political gerrymandering. No racial gerrymandering claims are advanced.

[29] Because the court finds unlawful vote dilution pursuant to the results test of § 2 of the Voting Rights Act, the court need not address plaintiffs' separate argument of intentional vote dilution set forth in their supporting memoranda.

98-6718/6778

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, ET AL. (98-6718); PHILLIP R. LANGSDON, ET AL. (98-6778),	)	
Plaintiffs-Appellees,	)	ORDER
v.	)	(Filed May 16, 2000)
DON SUNDQUIST, GOVERNOR OF THE STATE OF TENNESSEE, ET AL.,	)	
Defendants-Appellants.	)	

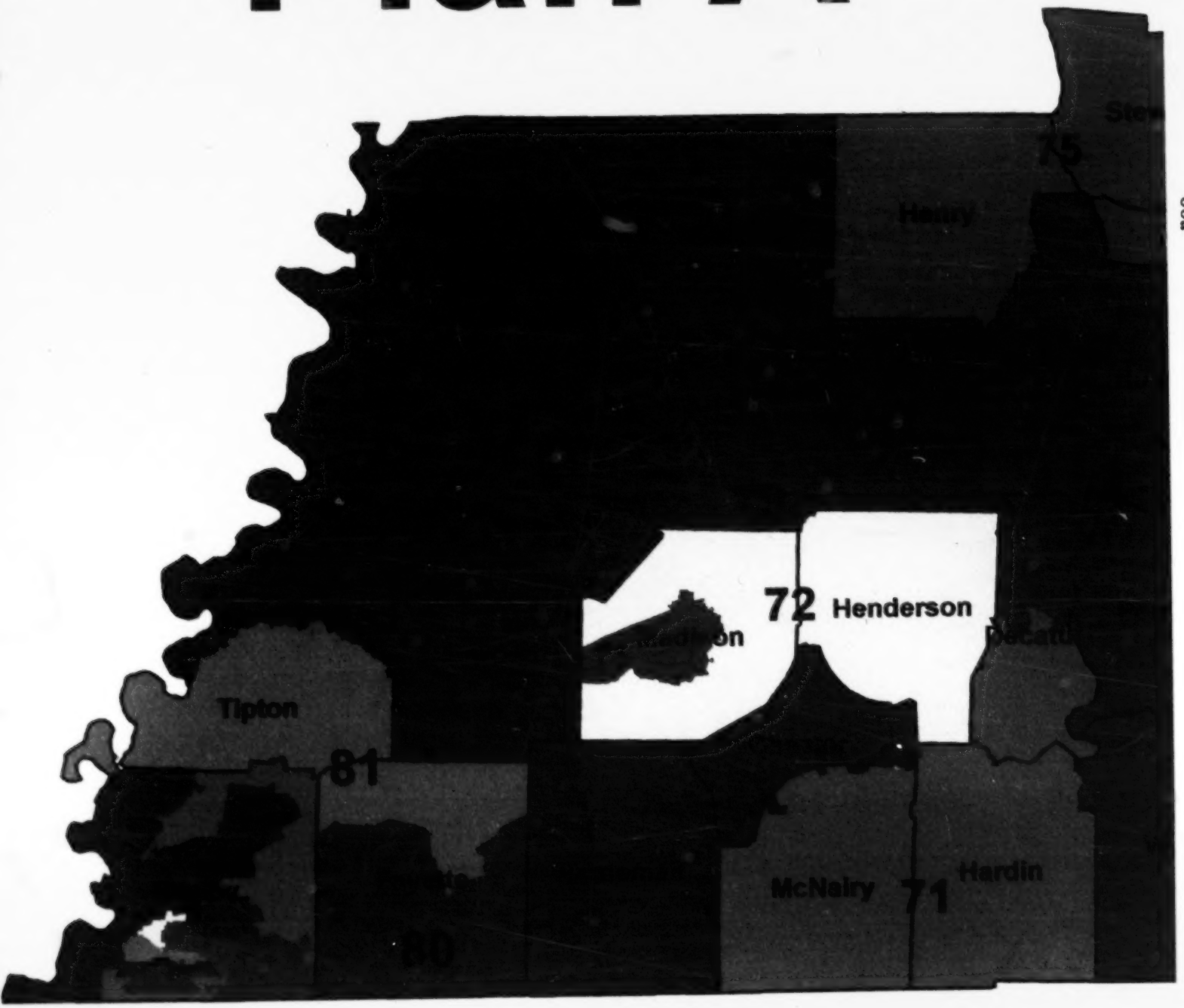
BEFORE: JONES, BATCHELDER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition have been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

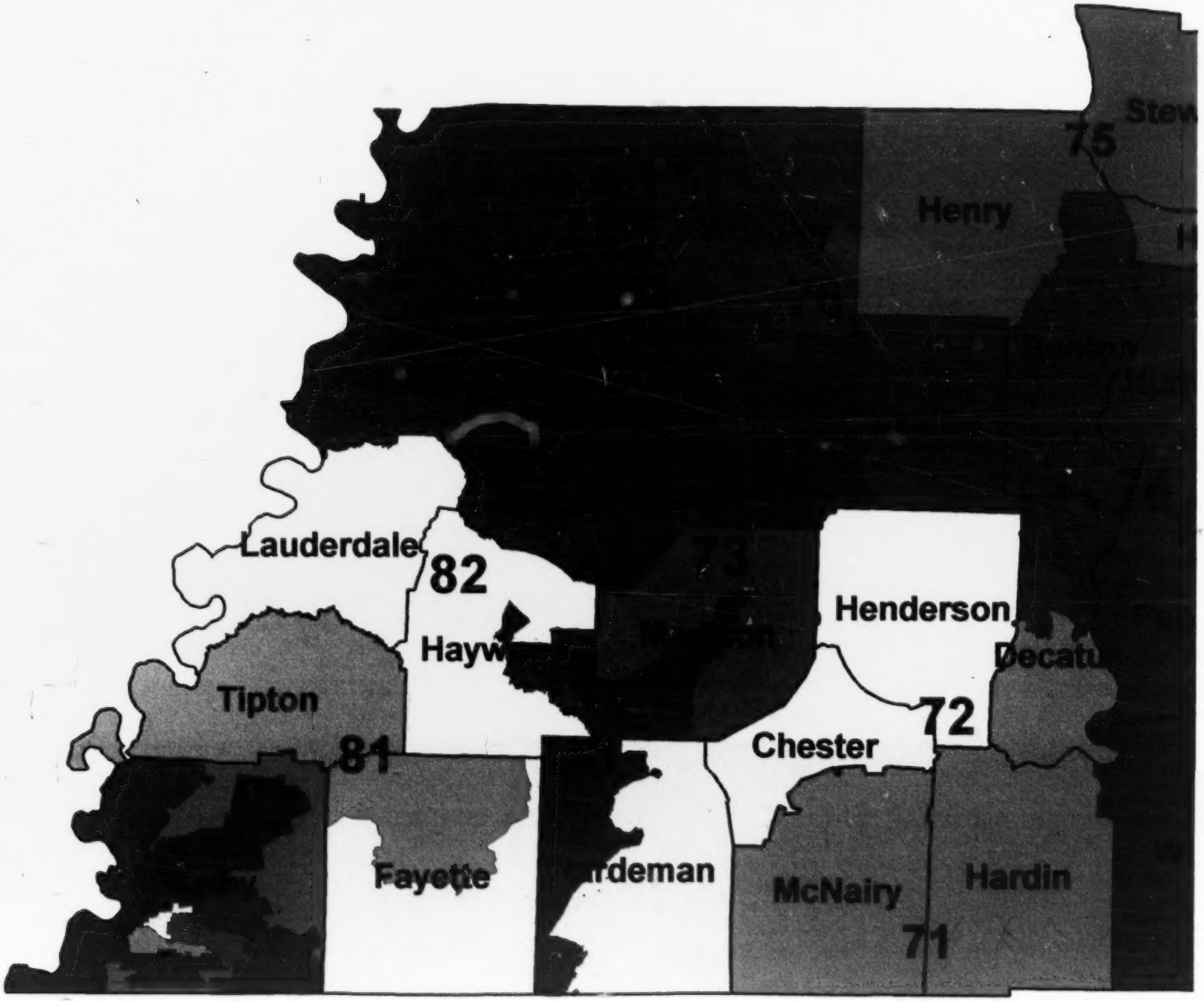
The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk lh

Plan A



Plan B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No. 00-254

Supreme Court, U.S.
FILED
SEP 15 2000
CLERK

In The

Supreme Court of the United States

DON SUNDQUIST, Governor of Tennessee, *et al.*,

Petitioners,

v.

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PARTIES TO THE PROCEEDING

Petitioner's Statement of Parties to the Proceeding is correct except that David Shirley, listed as one of the Langsdon respondents, is not a party. Mr. Shirley attempted to intervene in the case at an earlier point in the litigation, but his motion to intervene was denied.

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REASONS FOR DENYING THE WRIT

The question presented by Petitioners is whether in a Voting Rights Act case, the plaintiff or the defendant is permitted to define the geopolitical area under analysis. The answer, of course, is that the court will define the area. In this case, the District Court, after hearing arguments from both sides, decided that the relevant geopolitical area was the six rural counties outside the urban county of Shelby. The court rejected the Petitioner's argument that the Court had to include Shelby County and its urban population. That decision was affirmed by the Sixth Circuit Court of Appeals.

The real issue in this case is whether the state can justify discrimination against a minority population in one part of the state by over-representing a similar minority group in another part of the state. The District Court and the Court of Appeals determined that the state cannot use over-representation in one part of the state to justify blatant discrimination in another part of the state.

Furthermore, given the timing of the case, it is unlikely that further rulings in this case will have any effect. The 2000 Decennial Census has been completed and the results of that enumeration will be published in the spring of 2001. After the results are known, the Tennessee General Assembly will begin the process of drawing new legislative district lines, based on the new population numbers. Thus, the plan of redistricting which is the subject of this case and which will be in effect for the 2000 election, will never be used again.

Rather, a new plan based on the 2000 census numbers will be in effect for the next election.

STATEMENT OF THE CASE

This case arises from the redistricting which followed the 1990 Decennial Census. As has been the case with every redistricting since 1911,[1] the plan was challenged in Court. In this case, two sets of plaintiffs filed lawsuits. The Rural West Tennessee plaintiffs, representing minority voters in rural west Tennessee, filed a challenge to both the House and Senate plans adopted by the legislature in 1992. The Langsdon plaintiffs, representing both white and black voters from across the state, filed a challenge only to the House plan.

The Langsdon plaintiffs' challenge to the House plan was resolved on Summary Judgement, with the three judge District Court unanimously finding that the House plan violated the "one person, one vote" standard of the Fourteenth Amendment. *Langsdon v. Millsaps*, 436 F. Supp. 447 (W.D. Tenn. 1993), *aff'd*, 510 U.S. 160 (1994).

The Rural West Tennessee plaintiffs then tried their Senate claim. It should be noted that in Tennessee, there are 33 Senate districts and 99 House districts. Under the 1990 Census, the ideal district size for Senate districts

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[1] Not once between 1900 and 2000 did the General Assembly correctly redistrict itself without judicial intervention. *Baker v. Carr*, 222 F. Supp. 684 (M.D. Tenn. 1963), *Kopald v. Carr*, 343 F. Supp. 51 (M.D. Tenn. 1972), *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702 (1982).

was 147,792 and the ideal size for House districts was 49,264. Thus, the area necessary to make up a Senate district is generally three times larger than that needed for a House district. In the Senate case, the three judge panel found that the Senate plan violated the Voting Rights Act. The State appealed and this court remanded for further consideration in light of *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

In the meantime, the Tennessee General Assembly adopted a new plan of redistricting for the House (Ch. 536, Acts of 1994), in response to the earlier decision of the District Court in the Langsdon case. This new plan was immediately challenged by both sets of plaintiffs through Amended Complaints.

This new plan contained three alternatives, two of which are relevant to the discussion here. One, known as Plan A, provided for no majority-minority districts in the rural area outside Memphis. The second, known as Plan B, created a majority-minority district in the rural counties. The districting in Memphis and Shelby County was the same under both plans, increasing the number of majority-minority districts from eight to nine.

In the Amended Complaint of the Langsdon plaintiffs, a challenge was raised to the new plan based on a violation of the Voting Rights Act in the six county area of rural west Tennessee.[2] At no time have the Langsdon plaintiffs suggested that Shelby County should be included in the analysis, creating a seven county area in

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[2] Fayette, Hardeman, Tipton, Haywood, Madison and Lauderdale counties.

west Tennessee. To the contrary, the Langsdon plaintiffs have asserted and continue to assert that the State has attempted to rationalize its discrimination against minority voters in the rural areas of west Tennessee by over-representing minority voters in Shelby County.

Based on the 1990 Census data, which were used in the trial of this case, Shelby County is the most populous and urbanized county in the state of Tennessee. It includes the largest city in the State: Memphis. The six counties outside Memphis are of a rural nature. While Memphis has a population of over 600,000 and Shelby County has a population of over 800,000, the surrounding counties range in size from 25,000 to 65,000.

There are 17 state house districts in Shelby County and 5 house districts in the surrounding six county rural area. The minority population in Shelby County is 39.68% voting-age population. In the rural areas the minority population is 31.01% voting-age population. Under the 1994 plan for the state house, 52.94% of the house districts in Shelby County are majority-minority districts. In the rural counties, 0% – none – are majority-minority.

This is not a case about maximization of minority representation. It is a case about an old fashioned racial gerrymander. The fact is that the state deliberately chose to fragment minority communities in the rural area in order to preserve white incumbents and deny the minority community representation.

ARGUMENT

I. This case will be moot after November 7, 2000

The 2000 elections for the House are set for November 7, 2000. Following the decision of the District Court, as affirmed by the Sixth Circuit Court of Appeals, Plan B is in effect for this election. Petitioners have sought stays from the District Court, the Sixth Circuit and this Court. All requests for a stay have been denied.

The 2000 Census has been completed and the information will be released in early 2001. The redistricting process for the next decade will then begin. The General Assembly could begin drafting new districts as soon as it has the Census information. Thus, the legislative session commencing in January of 2001 could result in a new plan of redistricting. As noted by the Petitioners, "Plan B, in the ordinary course, would not be used after the 2000 elections." Pet. p. 13.

Thus, there is not an actual case or controversy before the court. What Petitioners seek is, in effect, an advisory ruling for the next round of redistricting. This is not an appropriate request for certiorari.

Furthermore, any ruling in this case would be of limited value to the State of Tennessee or any other state, since the ruling is necessarily dependent on the particular population facts of this case. The 2000 census will likely show shifts in population in both the urban and rural portions of west Tennessee. As a result, there may be more or fewer house districts in either region. There may be greater or lesser minority populations in either region.

Thus, it is premature for this Court to rule on the standards to be applied to the post-2000 redistricting, as Petitioners request.

II. The decisions below regarding the relevant geopolitical area are consistent with this Court's previous opinions

Defendants assert that the District Court erred by limiting its analysis to the six rural counties in West Tennessee. They assert, as they did below, that Shelby County should have been included in the analysis. Defendants fail to note that the Langsdon plaintiffs have consistently argued that Shelby County, which is the most urban county in Tennessee, and contains its largest city, Memphis, should be excluded. Defendants contrast the Rural West Tennessee plaintiffs' position in their original Complaint challenging the 1992 redistricting and the position taken by the Rural West Tennessee plaintiffs in their Second Amended Complaint challenging the 1994 redistricting.

Defendants claim to be fearful that the decision of the lower courts would permit plaintiffs to select the area in which to bring any §2 challenge. This fear is misplaced. Any plaintiff is restricted to bringing an action where the injury occurred. The scope of the injury defines the scope of the relevant geopolitical inquiry. The first two *Gingles* preconditions define the scope of the injury: geographical compactness and political cohesion. *Thornburgh v. Gingles*, 478 U.S. 30 (1986). Absent these factors, no plaintiff can prevail. These factors alone dictate the appropriate geopolitical area to be considered. In Tennessee, this is the

area of rural west Tennessee, where a geographically compact and politically cohesive minority community exists. The principles of compactness and cohesiveness are negated by the inculsion of Shelby County, which is an urban county. As noted by the Court of Appeals:

> "While Shelby County is the southernmost and westernmost county in the State and, like the six neighboring counties of rural west Tennessee, has a large African-American population, the seven counties do not form a coherent demographic unit. The African-American population in Shelby County is concentrated in inner-city Memphis, and is largely set off from rural west Tennessee by a buffer zone of white suburbs. As a result, the African-American populations in these two areas are not likely to be particularly cohesive."

Pet. 19a.

Petitioners' argument that this approach leads to maximization turns logic on its head. It is Petitioners, not Respondents, who have attempted to manipulate the area under judicial scrutiny. The District Court noted that it is the Petitioners who are attempting to shift the area under analysis so as to include a county in which minority populations are the majority in a number of districts greatly in excess of their proportion of the population in that county:

> . . . when Defendants attempt to add another county to plaintiffs' challenged region, as in the instant case, over-proportionality in the added county may again conceal dilution in the plaintiffs' challenged region.

Pet. 40a.

This is precisely the danger this Court warned of in *Shaw v. Hunt*, 517 U.S. 899 (1996) and *DeGrandy*. As the Court of Appeals noted, quoting *Johnson v. DeGrandy*, "the rights of some minority votes under §2 may be traded off against the rights of other members of the same minority class." Thus, the decisions of the lower courts reflect a correct application of the principles set forth by this Court in its earlier opinions. Judge Jones in his concurring opinion, was even more emphatic. He found that the Petitioners' position " . . . is contrary to the Supreme Court's interpretation of §2, which clearly provides that a state *may not* remedy vote dilution in one area by legal compliance in another." Pet. 27a (emphasis in original).

It is not the decisions below, but rather, the Petitioners' position which takes the law in directions not contemplated by previous decisions of this Court.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

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No. 00-254

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In The

Supreme Court of the United States

DON SUNDQUIST, Governor of Tennessee, et al.,

Petitioners,

v.

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the court below that Plan A for the state house of representatives enacted by the Tennessee legislature in 1994 violated Section 2 of the Voting Rights Act was clearly erroneous?

2. Whether the issue sought to be raised in the petition for writ of certiorari is moot?

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ARGUMENT

I. Introduction

The evidence of minority vote dilution in this case was, in the words of the court of appeals, "simply overwhelm[ing]." Pet. App. 20a. The remedy, moreover, did not achieve proportionality for black voters in Rural West Tennessee, let alone maximize their voting strength. As the district court concluded:

> the requirement of a majority-black district in that area, which would make only 20% of the House districts in that area majority-black, ought not be viewed as an improper attempt to maximize majority-minority districts, but as a minimal requirement for the political equality of black voters in that six-county area.

Pet. App. 80a. In any case, given the fact, as petitioners concede, *see* Pet. 13, that the remedial plan will not be used after the 2000 election, any issues sought to be raised in the petition are essentially moot.

II. The Evidence of Vote Dilution Was Overwhelming and Is Undisputed

Respondents, plaintiffs below, challenged house redistricting in the six-county area of Rural West Tennessee. The counties are Jackson, Hardeman, Fayette, Tipton, Lauderdale, and Haywood. Pet. App. 7a. The district court, after conducting a careful and thorough analysis under *Thornburg v. Gingles*, 478 U.S. 30 (1986), found that Plan A of Chapter 536 of the Tennessee Public Acts of 1994 violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Pet. App. 86a. The decision was unanimously

affirmed by the court of appeals, which found that the factors showing minority vote dilution were "simply overwhelm[ing]." Pet. App. 20a, 30a.

The parties stipulated that the first two factors identified by the Court in *Thornburg v. Gingles*, 478 U.S. at 50-1, as probative of minority vote dilution had been satisfied, *i.e.*, geographic compactness and minority political cohesion. Pet. App. 6a. The district court further found, and the court of appeals affirmed, that: the white majority voted as a bloc usually to defeat the minority's candidates of choice; no black had ever been elected to the state legislature from the six-county area; there was a history of past and ongoing discrimination in voting; blacks suffered disadvantages in such areas as education, employment, and health; none of the five house districts covering the area contained a majority of black voters; and blacks in Rural West Tennessee did not have an equal opportunity to participate in the political process. Pet. App. 12a, 14a-16a. Significantly, petitioners do not contend that any of the court's factual findings are clearly erroneous.

Chief Judge Julia Smith Gibbons, to whom this case was assigned following the death of District Court Judge Jerome Turner, denied petitioners' application for a stay pending appeal after concluding that defendants had not "made a strong showing that they are likely to succeed on the merits" and that "the public interest does not favor continued denial of voting rights." Order of February 18, 2000. In addition, the court of appeals denied petitioners' petition for rehearing *en banc* without a single dissenting vote. Pet. App. 87a. Finally, Justice Stevens denied petitioners' application for a stay pending the filing of a

petition for a writ of certiorari. Pet. 7-8. In short, this case has been reviewed by numerous federal judges at the trial and appellate levels, including a Justice of this Court, and none has given any indication whatever that the decision of the lower court was problematical or that the petitioners' claims have merit.

Moreover, the Tennessee legislature itself anticipated that Plan A, because it fragmented minority voting strength, might be found to violate the Voting Rights Act. As a consequence, it enacted an alternative plan, Plan B, to be automatically implemented if Plan A "is declared invalid . . . on the grounds of dilution of minority voting strength." 1994 Tenn. Pub. Acts ch. 536, § 2. As a matter of state law, Plan B became the duly enacted legislative plan in Tennessee following the decision of the lower court. Pet. App. 20a, 85a.

The finding of the court below of vote dilution is, of course, subject to review under the clearly-erroneous standard of Rule 52(a), F.R.Civ.P. *See Thornburg v. Gingles*, 478 U.S. at 79. In light of the Court's "long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous," *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972), and given the fact that petitioners do not contend that the factual findings of the lower court are clearly erroneous, the petition for writ of certiorari should be denied.

III. This Case Presents No Issue Worthy of Certiorari

Petitioners' sole argument in support of their petition for a writ of certiorari is that the decision of the lower

court is a "prescription" for minority maximization that conflicts with *Johnson v. De Grandy*, 512 U.S. 977 (1994). Pet. 9. Notably, petitioners do *not* contend that Plan B, the plan automatically implemented by the state as a result of the decision of the lower court, is itself a "maximization" plan, that it constitutes a racial gerrymander, or that it presents any problems of any kind under the equal protection clause of the Fourteenth Amendment. Rather, petitioners acknowledge the absence of "maximization . . . in this case." Pet. 9. And as the district court found, "no arguments concerning Plan B have been heard, nor has any party alleged that Plan B constitutes an unconstitutional racial gerrymander." Pet. App. 85a-86a. If the decision of the lower court were a "prescription" for maximization, as petitioners contend, it would be a highly ineffective and anemic one, for it has produced no maximization.

In fact, the decision of the court below is not a prescription for maximization. As the court correctly concluded, "the *Gingles* preconditions operate to prevent just the sort of limitlessly small 'reverse gerrymander' whose specter the State raises here." Pet. App. 19a. *See also* Pet. App. 46a ("the three *Gingles* preconditions operate to eliminate meritless claims, and, thereby, check any concern that plaintiffs can continually narrow their challenged area until they achieve a vote dilution victory"). According to the court, a minority group that is not sufficiently large and geographically compact cannot "sustain a § 2 claim." Pet. App. 19a.

Petitioners erroneously claim that the issue unresolved by *Johnson v. De Grandy* was "whether majority-black or influence districts" should be used in examining

proportionality. Pet. 3. To the contrary, the issue the Court actually left open was whether proportionality should be judged on a statewide basis or with reference only to the areas identified in the plaintiffs' complaints where vote dilution was alleged to occur. *Johnson v. De Grandy*, 512 U.S. at 1022. The Court elected to do the latter, *id.* at 1014, but it never suggested that proportionality was to be determined by examining so-called influence districts. *Johnson v. De Grandy* is unambiguous that proportionality "links the number of majority-minority voting districts to minority members' share of the relevant population." 512 U.S. at 1014 n.11. Equating majority white districts with majority black districts in measuring proportionality, as petitioners suggest, would not only be inconsistent with *Johnson v. De Grandy* and the "opportunity . . . to elect" standard of Section 2, but would render a proportionality analysis utterly meaningless and irrational.

Petitioners also repeatedly misrepresent that the lower courts ignored statewide figures in conducting a proportionality analysis. *See* Pet. 7 (the district court "excluded . . . the entire state from the proportionality analysis"); Pet. 11 (the court of appeals "reject[ed] consideration of . . . statewide . . . numbers"). The misrepresentation can only be seen as an attempt to manufacture an issue that does not exist, for in its opinion on the merits the district court expressly held that "even on a statewide level, the creation of an additional majority-minority district would not exceed substantial proportionality." Pet. App. 80a n.24. The court of appeals, in affirming the district court, similarly took into account proportionality "[o]n a statewide basis." Pet. App. 16a-17a.

Neither Plan A nor Plan B maximizes minority voting strength, whether a statewide or area analysis is used. Under Plan A there were 99 house districts, 12 of which (12.12%) were majority black. Pet. 10. Under Plan B there are also 99 house districts, 13 of which (13.13%) are majority black. *Id.* Blacks are 16% of the total population of the state and 14.4% of the voting age population (VAP). *Id.*; Pet. App. 80a n.24. If blacks were proportionately represented on a statewide basis, and assuming that VAP rather than total population is the appropriate measure of proportionality, they would be a majority in 14.4% (as opposed to 13.13% under Plan B and 12.12% under Plan A) of the districts.

Under Plan A there were five house districts in Rural West Tennessee, all of which were majority white. Pet. App. 16a, 79a. Under Plan B there are also five house districts in Rural West Tennessee, one of which (20%) is majority black. Blacks are 34% of the total population of Rural West Tennessee and 31% of VAP. *Id.* If blacks were proportionately represented in Rural West Tennessee they would be a majority in 31% (as opposed to 20% under Plan B and 0% under Plan A) of the districts (again assuming VAP, rather than total population, is the appropriate measure of proportionality). The district court's regional and statewide analysis is presented in tabular form below.

Plan/Population	Statewide	Rural West Tennessee
Total black pop.	16%	34%
Black VAP	14.4%	31%
1994 Plan A Maj. black dist.	12 of 99 (12.12%)	0 of 5 (0%)
1994 Plan B Maj. black dist.	13 of 99 (13.13%)	1 of 5 (20%)

The district court correctly concluded that:

> the requirement of a majority-black district in that area [of Rural West Tennessee], which would make only 20% of the House districts in that area majority-black, ought not be viewed as an improper attempt to maximize majority-minority districts, but as a minimal requirement for the political equality of black voters in that six-county area.

Pet. App. 80a.[1]

A. Plaintiffs Were Not Required to Sue Metropolitan Shelby County. Petitioners, in a further and unavailing attempt to create a maximization defense, argue that the lower court was somehow obligated to include metropolitan Shelby County in its analysis. Shelby County, however, is not in Rural West Tennessee.

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[1] Even if Plan B achieved proportionality, which it does not, that would not provide a safe harbor from a Section 2 challenge. As Johnson v. De Grandy, 512 U.S. at 1020-21, provides, "[n]o single statistic provides courts with a short-cut to determine whether a set of single-member districts unlawfully dilutes minority voting strength."

The six predominantly rural counties in Rural West Tennessee are a politically cohesive, geographically compact area of the state. Pet. App. 19a. Shelby County, by contrast, is the largest urban county in the state. It has a population of 826,000 people, more than ten times the size of the largest county in Rural West Tennessee. Revised Stipulation of Facts, Addendum 7, pp. 1-9. The black population in Shelby County is also concentrated in inner-city Memphis and is largely set off from Rural West Tennessee by a "buffer zone" of white suburbs. As the lower court found, "the African-American populations in these two areas are not likely to be particularly cohesive." Pet. App. 19a.

Blacks in Rural West Tennessee share economic disadvantages; they "have about half the per capita income of whites and three times the poverty level." *RWTAAAC v. McWherter*, 836 F.Supp. 447, 459 (W.D.Tenn. 1993).[2] They also have a common and special history of discrimination, including discrimination in voting. The strongest examples of intimidation and discrimination against black voters cited by the lower court were those that took place in Rural West Tennessee. *Id.* at 461. Most important, in Rural West Tennessee "black candidates have not been elected in the past . . . [and] are not in a position to enjoy the benefits of incumbency and political sponsorship which comes with being part of the political mainstream." *Id.*

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[2] The district court here incorporated the findings of fact in the prior decisions of the court involving senate redistricting in Tennessee. *See* Pet. App. 56a.

Given the findings of the court, there is nothing arbitrary or irrational in treating Rural West Tennessee as an area for purposes of a Section 2 vote dilution challenge. As the court of appeals concluded, "we note that the region selected by the plaintiffs in this case is a sensible one – indeed more sensible than the seven-county area including Shelby County urged by the state." Pet. App. 19a.

Petitioners erroneously claim that plaintiffs in their Second Amended Complaint included Shelby County in their challenge to redistricting in Rural West Tennessee and "changed their position by excluding Shelby County" only after being essentially invited to do so by the district court. Pet. 6. To the contrary, the Second Amended Complaint made it clear from the beginning that plaintiffs challenged redistricting in West Tennessee *and* in Rural West Tennessee as a separate, distinct area. Second Amended Complaint, paras. 37, 40, 45, 46. As the district court found, plaintiffs elected to pursue *only* their claim involving Rural West Tennessee, a decision which the court acknowledged was "a legitimate voluntary dismissal of plaintiffs' statewide and Shelby County vote dilution claims." Pet. App. 46a.[3]

Plaintiffs have no quarrel with and do not challenge house redistricting in Shelby County. It is elemental that parties, within the limits of Rules 8 and 11, F.R.Civ.P., are free to frame their pleadings as they wish. Defendants

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[3] Plaintiffs' decision to pursue only their Rural West Tennessee claim was based on their assessment that they were unlikely to prevail on a Section 2 challenge to redistricting in Shelby County.

cannot force plaintiffs to bring claims different from the ones they have elected to bring, nor can they force a court to adjudicate claims that were not brought. *See* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1286, at 559 (2d ed. 1990) ("the liberal construction accorded a pleading under Rule 8(f) does not require the courts to fabricate a claim that a plaintiff has not spelled out in his pleadings").

In addition, the adjudication of a claim not brought or maintained by a party would constitute a purely advisory opinion beyond the power of the court to grant. *See Muskrat v. United States*, 219 U.S. 346, 354 (1911); *C. & S. Airlines v. Waterman Corp.*, 333 U.S. 103, 113-14 (1948). As the Court held in *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947), " 'concrete legal issues, presented in actual cases, not abstractions,' are requisite" for adjudication by a federal court.

Petitioners' argument that plaintiffs could not limit their challenge to house redistricting in Rural West Tennessee, but were obligated to sue or include a huge urban county, is not only improbable but is also without precedent. *Thornburg v. Gingles* explicitly recognized the right of plaintiffs to limit their Section 2 claims to those areas of a state in which vote dilution was alleged to occur. The plaintiffs in that case challenged only seven districts in the state's legislative plan, six of which were held to violate Section 2. *Gingles*, 478 U.S. at 35, 77.[4]

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[4] The right of plaintiffs to bring claims against specific areas where minority voting strength was claimed to be diluted has been routinely acknowledged by the lower courts. In NAACP v. Austin, 857 F.Supp. 560, 569 n.5 (E.D.Mich. 1994), for

The Court also made it clear in *Shaw v. Hunt*, 517 U.S. 899 (1996), that vote dilution is not remedied in one area of a state merely because minority voting strength is not diluted in some other area. *Id.* at 917 ("[t]he vote dilution suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State"). As the district court here held, relying upon *Shaw v. Hunt*, "the presence or absence of vote dilution in a particular region of a state cannot be determined by looking to the statistics of another region of the same state." Pet. App. 42a. And as the court of appeals held, accepting the state's argument "would require us to trade the § 2 rights of individual African-Americans in rural west Tennessee against those of African-American groups elsewhere in the State." Pet. App. 18a-19a. The fact that minority voting strength may not be diluted in Shelby County cannot, therefore, stand for the proposition that black voting strength is not diluted in Rural West Tennessee, where there are no majority black house districts and no black house members.

In this case, the obvious reason petitioners want Shelby County included in a proportionality analysis is

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example, plaintiffs limited their challenge to Wayne and Oakland Counties. In Marylanders for Fair Representation, Inc. v. Shaefer, 849 F.Supp. 1022, 1047 (D.Md. 1994) (three-judge court), the court rejected a vote dilution challenge in Baltimore, but concluded that the state's plan diluted the voting strength of blacks residing in the Eastern Shore and required the creation of a majority black district in that area of the state. According to the court, "there has never been a black State Senator or Delegate from any of the nine counties of the Eastern Shore," and "[t]he State's recently enacted redistricting plan promises more of the same." 849 F.Supp. at 1064.

because it masks or hides the dilution that occurs in Rural West Tennessee. As the district court concluded, "when defendants attempt to add another county to plaintiffs' challenged region, as in the instant case, over-proportionality in the added county may again conceal dilution in the plaintiffs' challenged region." Pet. App. 40a. The court below did not err in its proportionality analysis or fail to comply with the decisions of this Court.

IV. Any Issues Sought to Be Raised in the Petition Are Moot

Petitioners concede that "plan B will not . . . be used after the 2000 election." Pet. 13. Elections held in 2002 and subsequent years will be governed by a new plan based on the 2000 census. Under the circumstances, any decision of this Court concerning the legality of Plan B, which would necessarily come after the November 2000 elections, would be entirely advisory. Indeed, petitioners urge the Court to grant certiorari, not to resolve any continuing dispute among the parties, but to advise Tennessee and other states on how to "frame and defend their post-2000 redistricting plans." Pet. 13.[5]

This Court has repeatedly held that "Article III . . . confines [federal courts] to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character.' " *Lewis v. Continental*

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[5] Since Tennessee is not covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, this case does not present a situation where the existing plan will serve as the baseline for evaluating the 2002 plan for purposes of preclearance. *Cf.* Reno v. Bossier Parish School Bd., 120 S.Ct. 866, 871 (2000).

Bank Corp., 494 U.S. 472, 478 (1990) (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937)). This case no longer has the aspect of a "real and substantial" controversy. Accordingly, the petition for a writ of certiorari should be denied as moot.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

1. Respondents have failed to present any grounds to rebut petitioners' arguments that the issue in this case warrants this Court's review. The court of appeals granted Section 2 plaintiffs essentially unfettered freedom to manipulate the "area of dispute" and, hence, the critical numerical component of vote-dilution analysis. Respondents cannot deny the broad importance of that legal ruling for redistricting throughout the Nation.

Although respondents try to argue otherwise, the record of this case highlights the license to manipulate the analysis and later the ultimate result. Petitioners filed a Motion for Summary Judgment on the grounds that "once Shelby County is included in the court's frame of reference, the number of majority-African-American districts is substantially proportional to the black voting age population's share of the total population in the relevant seven-county area [of west Tennessee.]" Pet. App. 32a. As a result of this Motion, the district court specifically requested in an order of March 13, 1997, that respondents specify whether they intended to include Shelby County in their challenge. *Id.* at 33a. In responding to the district court order, Respondents stated that their Second Amended Complaint was now "limited to a claim of vote dilution in the six-county region of Tennessee including, Fayette, Hardeman, Haywood, Lauderdale, Madison, and Tipton Counties." *Id.* This position is directly contrary to the allegations in the Second Amended Complaint in

which Respondents had specifically included Shelby County in the "area of dispute."[1]

Respondents altered their position by removing Shelby County from the "area of dispute" because had they not done so the district court would have granted summary judgment in favor of Petitioners. The district court expressly stated: "In short, if the court considers statewide statistics or includes Shelby County in its proportionality analysis for rural west Tennessee, the plaintiffs will not prevail on their vote dilution claim." *Id.* at 38a.[2] (Emphasis added) These facts demonstrate the

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[1] In their Second Amended Complaint, Respondents alleged that "[t]he personal plaintiffs reside in the seven-county area in West Tennessee – Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton – where new majority African-American legislative districts can be drawn." (R., 172: Second Amended Complaint, ¶ 5.) Having defined "West Tennessee" to include Shelby County, Respondents then defined the "area of dispute" for purposes of the third prong of *Gingles* as follows: "Candidates for elective office preferred African-Americans in Tennessee, including West Tennessee, are usually defeated by the white majority voting as a bloc." (R., 172: Second Amended Complaint, ¶ 32)

[2] Respondents also argue that Petitioners "repeatedly misrepresent that the lower courts ignored statewide figures in conducting proportionality analysis." Brief in Opposition to Petition for Writ of Certiorari, p. 5. Yet, if the district court concluded that "if the court considers statewide statistics . . . in its proportionality analysis for rural west Tennessee, the plaintiffs will not prevail on their vote dilution claim," then how could the district court have considered statewide statistics and found vote dilution other than to have ignored the statewide statistics. Furthermore, the lower courts' decisions simply do not square with the Senate version of this same case in which this Court affirmed the three-judge panel's holding that there

importance, in individual cases and in Section 2 litigation generally, of the Sixth Circuit's rule remitting the selection of the "area of dispute" to the self-interested discretion of plaintiffs who, as in this case, will narrow the "area of dispute" so as to ensure a lack of proportionality in attempting to prove minority vote dilution. The ruling below merits review.

3. Respondents assert that "[t]his case no longer has the aspect of a 'real and substantial' controversy" and is, therefore, "moot." Br. In Opp. at p. 13. If the consequences identified in the petition are not enough to keep the case alive, the appropriate action for this Court is to vacate the decision below with an order that the case be dismissed. This Court has long held that when a civil case coming from a federal court "has become entirely moot, it is the duty of the appellate court" not merely to dismiss the appeal but "to set aside [that is, vacate] the decree and to remand the cause with directions to dismiss." *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936). In *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950), this Court explained that vacating the judgment below prevents the judgment from becoming *res judicata* and "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." Given the

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was no minority vote dilution in the 1992 Senate Plan which had lower ratio of majority-black districts to total districts (28.57% for Southwest Tennessee) than the 1994 House Plan (42.53%). *See Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 516 U.S. 801 (1995).

importance of the issue presented, that is the appropriate disposition if the judgment below is not reviewed.

By the time this Court remands this case to the Sixth Circuit, and the Sixth Circuit in turn remands it to the district court, and the district court orders dismissal, the general election on November 7, 2000, will have occurred under Plan B of the 1994 House Plan, as ordered by the district court. If this case is now moot because respondents will now obtain the relief they ultimately requested, *i.e.*, election under a house plan in which there is a majority-black district in rural west Tennessee, then this Court should, in the words of *Kelly v. Bennett*, 95 F. Supp. 2d 1301, 1306-07 (M.D. Ala. 2000), "wipe the slate clean" so that the Sixth Circuit decision as to the 1994 House Plan in no way binds petitioners in the upcoming 2000 redistricting of the Tennessee House of Representatives. Otherwise, this Court should grant certiorari.

CONCLUSION

The petition for writ of certiorari should be granted or the court should vacate the judgment of the court of appeals with an order to dismiss this case.

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